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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 1987

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QUESTIONS PRESENTED

1. Since the members of the National Football League (NFL) "are not true competitors, nor can they be," as the court below found, does their agreement as to the city in which each will present the League's joint product, NFL football, violate Section 1 of the Sherman Act when it prevents one member from presenting that product in an area in which a second NFL member operates.

2. Whether, in light of this Court's decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the NFL location agreement was properly held to violate Section 1 of the Sherman Act for want of "some sort of [NFL] procedural mechanism to ensure" full consideration of factors relevant to team relocation.

3. Whether a disappointed potential lessor of premises to a member that chose to violate the NFL agreement, which lessor is neither a competitor nor a consumer in the market in which the NFL members operate, has standing to recover damages under the Clayton Act from the NFL and its members.

THE PARTIES

Petitioners-defendants are the National Football League (NFL or League), a professional sports league organized as an unincorporated association, and twenty-seven of its twenty-eight member clubs.[1] Respondents-plaintiffs are the Los Angeles Memorial Coliseum Commission (Coliseum) and the Oakland Raiders, Ltd. (Raiders), the twenty-eighth NFL member club, now operating as the Los Angeles Raiders.

[1] Baltimore Football Club, Inc. (Indianapolis Colts); Buffalo Bills, Inc.; Chargers Football Company (San Diego Chargers); Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; The Five Smiths, Inc. (Atlanta Falcons); Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New Orleans Saints Louisiana Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc. (Washington Redskins); Rocky Mountain Sports, Inc. (Denver Broncos); San Francisco Forty-Niners; Seattle Professional Football; St. Louis Football Cardinals Company; and Tampa Bay Area NFL Football, Inc.

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OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the Court of Appeals for the Ninth Circuit in case Nos. 83-5572 and 83-5907, entitled *Los Angeles Memorial Coliseum Commission* v. *National Football League, et al.*

OPINIONS BELOW

The most recent opinion of the Court of Appeals, relating to respondents' damage claims, is reported at 791 F.2d 1356 (9th Cir. 1986) and is reproduced at Appendix A, pp. 1a-43a. An opinion of the District Court upholding the standing of the respondent Coliseum to sue for treble damages is at Appendix F, pp. 113a-115a. The orders of the District Court entering money judgments for respondents on the jury's verdicts are at Appendix C, pp. 48a-50a.

The earlier opinion of the Court of Appeals on interlocutory appeal from the granting of an injunction is reported at 726 F.2d 1381 (9th Cir.), *cert. denied,* 469 U.S. 990 (1984), and is reproduced at Appendix D, pp. 52a-103a. A decision of the District Court that the NFL agreement on team location is, as a matter of law, a conspiracy among business competitors subject to Section 1 of the Sherman Act is reported at 519 F. Supp. 581 (C.D. Cal. 1981) and is reproduced at Appendix E, pp. 105a-111a. The orders of the District Court enjoining enforcement of the League location agreement are at Appendices G and H, pp. 117a-124a and 126a-127a.

JURISDICTION

The Court of Appeals' most recent decision was entered on June 16, 1986, and petitioners' timely petition for rehearing was denied on March 12, 1987 (Appendix B, pp. 45a-46a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth in Appendix J, p. 143a.

STATEMENT OF THE CASE

The NFL produces sports entertainment. Each member annually co-produces with other members 16 regular season football games, which are followed by post-season playoffs among the winning teams and eventually the League championship game (the "Super Bowl"). Each member is organized under

separate ownership, thus assuring public confidence in the integrity of each team's efforts on the playing field. The NFL members engage only in professional football and their sole product is NFL football.

All of the NFL members "subscribe to and agree to be bound by the Constitution, By-Laws, Rules and Regulations of the League..." NFL Const. and By-Laws, Section 3.3(A)(6)(PX 38; 13 Tr.2d 2311-12)[2] these interdependent commitments govern the joint production and presentation of NFL football by all members. Through the NFL, the members establish scheduling patterns that foster consumer interest in their football product; negotiate national television contracts, with the revenues equally shared among the members; establish the division of gate receipts between the teams presenting League games; share the costs of centralized League management; and jointly direct all other phases of the League's operations. As the court below noted, over 90 percent of the members' total revenues are shared in accord with their agreement. (63a)

Each NFL member "holds a franchise from the League to operate a professional football club in a designated city." Section 3.4. The League franchise constitutes a commitment to the other members to operate in a designated home location, defined as "the city in which such club is located and for which it holds a franchise and plays its home games..." Section 4.1. (PX 38; 53a)

This litigation was commenced in 1978 by the respondent Coliseum under the Sherman Act, with jurisdiction based on 28 U.S.C. § 1337. It challenges the legality of Section 4.3 of the NFL Constitution and By-Laws, which provides for League decisionmaking on the relocation of members:

> No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by

[2] References to "Tr.2d" are to the transcript of the second trial. References to "CR" are to the Clerk's Record in the District Court.

> the affirmative vote of three-fourths of the existing member clubs of the League.[3] (54a)

The Coliseum, which operates one of several stadia in the Los Angeles area suitable for the presentation of professional sports and other events, claimed that Rule 4.3 was preventing it from obtaining an NFL tenant.

Since 1970 the respondent Raiders have been a member of the NFL. Through the 1981 season the Raiders conducted NFL operations in Oakland, California.[4] From 1978 until 1980, the Raiders, represented by League counsel, joined in the League's defense of Section 4.3. In early 1980, the Raiders, without seeking membership approval under Section 4.3, announced their intention to abandon Oakland—where they operated in the Bay Area along with the League's San Francisco 49ers—and to relocate to Los Angeles, where they would operate along with the Rams, who hold the Los Angeles franchise. (54a)

The NFL member clubs investigated the circumstances of the Raiders' proposed relocation in February and March 1980. After two League meetings at which the Raiders' proposed move was discussed, including a presentation by the Raiders, the member clubs voted without dissent that the Raiders should continue to conduct League operations in Oakland. The Raiders thereafter played the 1980 and 1981 NFL seasons in Oakland. (55a)

After deciding to abandon Oakland, the Raiders became a co-plaintiff in this action, joining the Coliseum in seeking (i) an injunction barring League decisionmaking under Section 4.3 as to the Raiders' relocation to Los Angeles and (ii) damages for the alleged additional profits each would have made had the Raiders immediately transferred to Los Angeles. The District Court directed bifurcation of the issues of liability and damages, if any. At the first trial in 1981, the District Court directed a

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[3] The three-fourths voting standard governs virtually all League decisionmaking.

[4] Prior to 1970 there were two competing leagues (the second being the American Football League--"AFL") and the Raiders held the AFL franchise for Oakland. In 1970 the NFL and the AFL implemented a plan for consolidating their operations into an expanded single league, with each of the AFL member clubs, including the Oakland Raiders, becoming NFL members. Congress had earlier approved that plan. 15 U.S.C. § 1291.

verdict that, as a matter of law, each League member should be treated as an independent economic competitor of each other member in considering whether Section 4.3—the League location agreement—violates Section 1 of the Sherman Act. (CR 786; 105a-111a) The District Court so instructed the jury, while refusing to instruct that the location agreement might be viewed as an ancillary restraint. (CR 794) The first trial ended with a hung jury. (55a)

At the second liability trial in 1982, the District Court denied defendants' motion for a directed verdict, rejecting the ancillary restraints contention (CR 2013, 2023), instructed the jury that the League location agreement was an agreement among independent economic competitors, and again refused to instruct on ancillary restraints. (Tr.2d 7211; CR 2042) The jury found that the NFL location agreement constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The District Court thereupon enjoined League decisionmaking under Section 4.3 of the League's Constitution with respect to the Raiders' move to Los Angeles.[5] (126a-127a)

On appeal, a divided panel of the Court of Appeals for the Ninth Circuit affirmed. (52a-103a) In so doing, the majority acknowledged that the NFL is an "exceptional" and "unique" integrated enterprise; (72a, 85a) that "the NFL teams are not true competitors, nor can they be"; (67a) that "the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football"; (74a) and that "the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation." (75a)

Nonetheless, the majority (1) upheld the District Court's ruling that the League location agreement constituted a conspiracy among independent economic competitors under Section 1 of

[5] Since entry of the injunction, the Raiders have played in Los Angeles. In doing so, they have continued as an NFL member and retained all benefits of League membership, including revenues from presenting NFL games against other League teams and from the League's television and other revenue-producing activities.

the Sherman Act; (63a) (2) ruled that the jury need not be instructed to evaluate the agreement as a restraint ancillary to the lawful joint production of NFL football; (81a) and (3) found the jury verdict warranted because the League location agreement prevented the Raiders from operating in the Los Angeles area where another NFL member also operated and because the League had failed to observe procedural safeguards in applying the location agreement. (78a-79a) Judge Spencer Williams, sitting by designation, dissented on the ground that the League location agreement, as a matter of law, does not restrain competition among economic competitors. This Court declined to review this interlocutory decision. 469 U.S. 990 (1984).

The damages trial resulted in judgments for the Coliseum of $14.58 million and for the Raiders of $34.66 million, after trebling. (2a; 48a-50a) In its most recent decision, the Court of Appeals (1) affirmed the judgment for the Coliseum, concurring in the District Court's conclusion that the Coliseum, as a potential lessor, had antitrust standing to recover damages (12a-13a), and (2) vacated the antitrust money judgment for the Raiders, remanding for a determination of the net loss,[6] if any, that the Raiders may have suffered after considering the windfall benefit they received by seizing the League's opportunity to franchise a new team in Los Angeles.[7](26a-27a)

REASONS FOR GRANTING THE WRIT

The decisions below constitute a serious misapplication of Section 1 of the Sherman Act and pose important conflicts with decisions of other circuits, and with applicable decisions of this Court.

The decisions misconceive the doctrine of ancillary restraints that antedates the Sherman Act and that was recently applied by the Court of Appeals for the District of Columbia Circuit in an opinion by Judge Bork. *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert.*

[6] Judge Nelson dissented as to the manner in which the net loss should be calculated. (33a-43a)

[7] The court also reversed a judgment for the Raiders on a good faith and fair dealing claim and remanded for vacation of the damage award on that claim. (5a-9a)

denied, 107 S. Ct. 880 (1987). They also refuse to limit the application of Section 1 to concerted action among true economic competitors in accord with this Court's analysis in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984).

In holding the NFL's location agreement an antitrust violation because of a lack of "procedural safeguards," the decisions below are squarely in conflict with this Court's decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), and this Court's more recent summary disposition of the decision in *Boating Industry Ass'ns* v. *Moore*, 106 S. Ct. 218 (1985), *vacating and remanding*, 754 F.2d 698 (7th Cir. 1985).

In permitting the Coliseum—at best a potential lessor—to recover treble damages, the decisions below fail to confine "antitrust standing" as required by this Court's analysis in *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and are in conflict with decisions of other courts of appeal and, most recently, the Sixth Circuit Court of Appeals holding that a potential lessor cannot sue for recovery of treble damages. *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983).

I. Fixing The Application Of Section 1 To Intra-Enterprise Agreements Would Resolve Serious Analytical Differences Between Decisions Of The Ninth Circuit, The District of Columbia Circuit And This Court

The agreement of the NFL members on the location of League franchises has as its purpose and effect the efficient production of a single product, NFL football, and the realization of the members' jointly owned right to share in the benefits from expansion opportunities. This product is co-produced through joint action of the members; no single member produces or could produce either the NFL product or a competing entertainment product. The co-production of NFL football requires numerous joint actions, including agreements on the number of games to be played, where they will be played, and with whom they will be played. The NFL members are not independent competitors or trade association members who have allocated territories in which each will market its individual product.

The antitrust laws must always be applied in the light of economic realities. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 14 (1979). This Court has often served notice that the economic realities of business relationships must be fully taken into account in choosing between *per se* and rule of reason principles. *E.g., National Collegiate Athletic Ass'n* v. *Board of Regents,* 468 U.S. 85 (1984); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, supra*; *Continental TV, Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). But the correct analysis under Section 1 of the Sherman Act of agreements among firms lawfully integrated by contract remains unclear, as the decisions below demonstrate.[8]

Although the courts below acknowledged that the NFL is a "unique" enterprise whose members are "not true competitors, nor can they be," they applied Section 1 of the Sherman Act to the NFL location agreement as if the NFL members were horizontal competitors independently producing and selling wholly separate products. The right to produce and market NFL football in a given community, the court below acknowledged, belongs to the "league as a whole." (24a) The decision to do so can only be made jointly by the League's members. In permitting a jury to find that the League's joint action constituted an impermissible agreement among competitors in restraint of trade, the court below misapplied two independent lines of authority that establish the legitimacy of an agreement among League members that designates the city in which each is authorized to present their jointly produced product.

A. *Ancillary Restraints Principles.* The court below recognized that "the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football." (74a) The court thus paid lip service

[8] This analysis was not required in the *NCAA* decision. The NCAA television sale agreements fixed prices and expressly limited output by barring various types of telecasts. The Court found these restraints unnecessary to optimize output and it was therefore not called upon to define the legal analysis for restraints that are, as here, necessary to the efficient conduct of the venture. 468 U.S. at 104-06. Section 4.3, as the court below found, is a location agreement essential and ancillary to the very existence of the NFL.

to the common law ancillary restraint doctrine first articulated by then Judge Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). This doctrine was frequently recognized by this Court in the early part of this century,[9] and was more recently re-examined by then Professor Bork.[10] Notwithstanding its acceptance of the "legitimacy" of the NFL's argument that the location agreement was an ancillary restraint, (74a-75a) the Court of Appeals vitiated the legal significance of that acceptance by holding that ancillary restraints are subsumed within the routine rule of reason inquiry applicable to agreements between horizontal competitors, and need not even be mentioned to the jury.

As the Court below recognized, the members of the NFL are not horizontal competitors. The lower courts that have reviewed the operations of the NFL have consistently termed it a "joint venture." *E.g.*, *North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1251 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).[11] At least for antitrust purposes, the term is synonymous with "partnership." *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 356 (1982); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc., supra*, 792 F.2d at 212; *National Bancard Corp. (NaBanco)* v. *VISA U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir.), *cert. denied*, 107 S. Ct. 392 (1986).

The Court of Appeals found in its initial opinion that the League joint venture "requires" territorial restrictions to encourage participation in the venture and "to secure each venturer the legitimate fruits of that participation." (75a) The court

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[9] Cline v. Frink Dairy Co., 274 U.S. 445 (1927); American Tobacco Co. v. United States, 221 U.S. 106 (1911); Cincinnati Packet Co. v. Bay, 200 U.S. 179 (1906); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

[10] R. Bork, *The Rule of Reason and the Per Se Concept*, 74 Yale L.J. 775, 797-98 (1965).

[11] Because league members are not engaged in competition with the League or with each other and have no independent business existence outside the League, the venture has no spill-over effects of the kind that can cause antitrust concern in other types of joint ventures.

nevertheless affirmed the finding of violation on the ground that the League's rule was "an agreement to control, if not prevent, competition among the NFL teams . . . ." (66a) In its second opinion, the Court of Appeals further found that all League members have a joint property interest in the value of League franchise locations. (28a) In spite of this finding, the court adhered to its original holding that the League location agreement violated Section 1 because the NFL members' enforcement of their legitimate joint rights prevented incidental competition between two of its members for sale of the League's product in the local Los Angeles market.[12] (13a)

This holding conflicts with the decision of the District of Columbia Circuit in *Rothery Storage & Van Co., supra.* There, the court examined the status under Section 1 of an agreement among separate members of an interstate trucking system not to compete against the members of the system. 792 F.2d at 217. The affiliated trucking companies were parties to an enterprise that was "identical, in economic terms, to a partnership formed by agreement." *Id.* The contracts provided that no member could use the facilities and name of the joint venture to compete against its members. Plaintiffs, competing carriers, claimed that the refusal of the affiliates to deal with them was illegal under Section 1 as a group boycott. The court held that the integration was lawful and that the restraint on competition between members of the venture was "ancillary to the economic integration." *Id.* at 214. "If the underlying contract integration is lawful . . . restraints ancillary to the integration . . . should be lawful." *Id.* at 230 n.11. *Accord Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185, 189-90 (7th Cir. 1985) (agreement among members of a retailing joint venture not to compete for retail sales a lawful ancillary restraint).

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[12] Where no such restraint on incidental local competition between member clubs would result from a sports league franchise location decision, the courts have held that no Section 1 claim is stated. *E.g.*, Seattle Totems Hockey Club v. National Hockey League, 783 F.2d 1347 (9th Cir.), *cert. denied*, 107 S.Ct. 405 (1986); Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974).

As Judge Bork made clear in *Rothery*, this reasoning is drawn directly from the opinion of Judge Taft in *United States* v. *Addyston Pipe & Steel Co., supra.* In that case, Judge Taft pointed out that, at common law, covenants not to compete that are "merely ancillary to the main purpose of a lawful contract" are lawful when "necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract." 85 F. at 282.[13] Such "ancillary" restraints, because they were lawful at common law, were not covered by the Sherman Act. It follows that a restraint that the Sherman Act was not intended to cover should not be tested by the various formulations that have grown up around Section 1 of that Act, such as the net impact of "pro" and "anti" competitive effects of agreements among true horizontal competitors and the availability of "less restrictive alternatives."

The direct applicability of *Addyston Pipe's* ancillary restraint analysis to sports league ventures formed one of the bases of then Justice Rehnquist's dissent from the denial of certiorari in *National Football League* v. *North American Soccer League*, 459 U.S. 1074 (1982). There, Justice Rehnquist properly observed that "NFL football is a different product from what the NFL teams could offer independently" and that the NFL has "made a market in which individual [teams] are inherently unable to compete fully effectively." *Id.* at 1077 (quoting *Broadcast Music, supra,* 441 U.S. at 22-23 (1979)). The NFL agreement challenged in that case thus could not be analyzed as if the NFL clubs were horizontal competitors independently producing separate products. Instead, *Addyston Pipe* was dispositive: the agreement was "a covenant by joint venturers who produce a single product not to compete with one another." *Id.* at 1077.[14]

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[13] Contract relationships that justify ancillary covenants not to compete include partnerships, joint ventures, employer-employee relationships, and sales of a going business. *See* Restatement (Second) of Contracts § 188 (1981).

[14] As Professor Areeda recently concluded, "a well-considered decision legalizing the creation of a joint venture necessarily expresses approval of all that is inherent and reasonably ancillary to it. Because it would be senseless for antitrust law to take away with one hand what it gives with the other . . . ." VII P. Areeda, *Antitrust Law* ¶ 1478b at 350-51 (1986).

The Court of Appeals here similarly recognized that NFL members are "not true competitors, nor can they be" (67a), but it erroneously affirmed the District Court's submission of the alleged restraint on competition to the jury under routine rule of reason principles fashioned for horizontal competitor relationships.

B. *Copperweld Analysis.* In *Copperweld Corp.* v. *Independence Tube Corp., supra*, the Court held that restraints on competition among separate legal entities within one corporate enterprise are beyond the scope of Section 1. As has been previously observed, no distinction in terms of economic substance can be sensibly drawn between enterprises integrated by ownership and those integrated by contract. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933); *Rothery Storage & Van Co., supra*, 792 F.2d at 230.

As in *Copperweld*, the NFL team location agreement did "not bring together economic power that was previously pursuing divergent goals." 467 U.S. at 769. As co-producers of a single product, the NFL members do not possess independent "economic power" or pursue "divergent goals" in marketing and selling their League product at the locations designated in the League agreement.

The NFL members cannot produce their sole product outside of the League itself and—so far as team location is concerned—they function as joint producers within an integrated enterprise acting with a single voice. If they are not able to do so, they cannot meaningfully exercise their commonly owned rights, such as expansion opportunities. If each of the League members were entitled to ignore that agreement and be free to present NFL football in the city of its choice, each League member would be exposed to free-riding, as the Court of Appeals recognized in its decisions.[13]

[13] Neither this analysis nor one based on ancillary restraints principles suggests that actions of sports leagues and their members are beyond scrutiny under the antitrust laws. In employing players and in purchasing other

(Footnotes continued on next page)

In holding that Section 1 nonetheless prohibited the NFL location agreement, the Court of Appeals appeared to believe that prior decisions of this Court upholding the so-called intra-enterprise conspiracy concept demanded such an anomalous result.[16] Shortly after the decision of the Court of Appeals, however, this Court, in *Copperweld*, observed with respect to those decisions: "To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled." 467 U.S. at 777.

In its recent decision, the Court of Appeals made it even clearer that adherence to the agreement on team location was not the action of competitors but of co-owners of a jointly held property right. It ruled that "the NFL as a whole owned the right to expand into the Los Angeles area." (24a) The value of that right arose "from the NFL's well-established and widely followed nationwide entertainment product . . ." (*Id.*) Accordingly, when it placed an expansion team in Los Angeles, the NFL was entitled to charge "the new expansion team owner for the expansion opportunity." (25a)

Recognition by the court below of these legitimate joint interests and concerns, and of the fact that the NFL members are not competitors, should have led the court below to a result consistent with *Copperweld*.

(Footnotes continued from preceding page)
"inputs," sports league members remain subject to Section 1 principles. For example, if some or all of the members—outside of collective bargaining and the labor exemption—were to present a united economic front against players or coaches, their actions would be subject to the rule of reason. In all respects, leagues and their members remain subject to the strictures of Section 2 of the Sherman Act. In his dissent from the Court of Appeals' first opinion, Judge Williams recognized that accounting for the economic realities of a league joint venture in no way implied antitrust immunity. (100a-101a)

[16] (60a-61a), *citing* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), and Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). In addition to *Perma Life* and *Timken*, the District Court relied on Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), and United States v. Yellow Cab Co., 332 U.S. 218 (1947). (106a-107a)

* * * *

Confirmation of the need for a coherent conceptual basis for analyzing the intra-league agreement involved here appears in testimony by the Antitrust Division of the Department of Justice before the Senate Judiciary Committee. *Hearings on S. 298 Before the Senate Committee on the Judiciary,* 99th Cong., 1st Sess. 379 (1985). (Appendix I, pp. 129a-141a) The Antitrust Division there expressed the view that decisions under league relocation rules "should be deemed per se lawful." The Division urged that antitrust "courts should defer" to league decisions under such rules because "the league's choice is highly likely to be procompetitive or competitively neutral" and because of the difficulty of assessing the net competitive effects in the two cities involved. (136a-137a) While this statement correctly describes why the rule of reason does not provide a workable test, it does not state a test of legality.

The rule of reason balancing test articulated in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978), *i.e.,* whether pro-competitive effects outweigh anti-competitive effects, establishes a workable principle of Section 1 analysis for restrictive agreements among horizontal competitors such as were involved there. But this test, when applied to integrated enterprises such as the NFL, is not only open-ended and formless but is open to serious abuse. As Professor Areeda has observed, the courts have not developed "comprehensible guides to 'reasonableness' " in reviewing sports league agreements under Section 1 of the Sherman Act, and judges and juries often "venture beyond competition and into management discretion" in such cases because the existing "substantive rules" do not guide judges or juries "very reliably or consistently." VII P. Areeda, *Antitrust Law* ¶ 1478d at 359 (1986).

The need for guidance is evident in the unworkable rule of reason approach affirmed by the court below: if the jury could find that the restraint was more "anti" than "pro" competitive in the Los Angeles area or as it affected stadia seeking NFL tenants

or that there were less restrictive procedural mechanisms for determining the location of NFL teams, the League location agreement would violate Section 1. Moreover, while the jury was asked to assess the "pro" and "anti" competitive effects of having the NFL's Raiders operate in Los Angeles rather than in Oakland, it was instructed to do so in terms of the potential for NFL two-team "competition" in the Los Angeles area while ignoring the offsetting elimination of equivalent "competition" between the Raiders and the NFL's San Francisco 49ers in the Oakland-San Francisco Bay Area. (82a)

In fashioning such an unsatisfactory rule, the Court of Appeals was heavily influenced by *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), holding that non-competition covenants among members of a joint marketing venture are *per se* illegal. (62a-63a) Judge Bork in *Rothery* considered both of these cases to have been "effectively overruled" by later decisions. *Rothery Storage & Van Co., supra*, 792 F.2d at 226. The Antitrust Division considers them "largely anachronisms." C. Rule, *The Administration's View of Joint Ventures*, 54 Antitrust L.J. 1121, 1123 (1985). However, the decisions below show that—like the intra-enterprise conspiracy decisions specifically overruled in *Copperweld* but relied upon by the Court of Appeals below—*Topco* and *Sealy* remain a source of confusion even when their *per se* holdings are not literally applied. (62a-63a)

The conflict between the decisions below and the analyses in *Rothery* and *Copperweld* and the Court of Appeals' reliance on decisions that have been overruled or are of questionable vitality present important and frequently encountered issues in the enforcement of Section 1 of the Sherman Act. They have not been, but should be, settled by this Court. No alternative test has been supplied by this Court to replace the discredited *per se* analysis of *Sealy* and *Topco*. The result is that the courts have no coherent standard by which to measure intra-enterprise agreements, and firms are unable to gauge in advance the lawfulness of their arrangements. Tests of legality framed for agreements

among business rivals, resorted to by the courts below, are plainly inadequate. Accordingly, this Court should accept this case and determine the proper analysis to be applied to intra-enterprise agreements.[17]

II. Allowing The Jury To Find An Antitrust Violation For Want Of Adequate NFL Procedural Mechanisms Conflicts With This Court's Decision In *Northwest Wholesale Stationers*

The District Court, in submitting the antitrust issues to the jury, and the Court of Appeals majority, in affirming the jury verdict that the NFL's location agreement violated Section 1 of the Sherman Act, both relied heavily upon perceived procedural defects in the NFL's decisionmaking process. *(E.g.,* 123a, 28a, 77a, 78a) Petitioners do not concede that there were such defects. Even if there were, however, this Court's decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), establishes that a violation of Section 1 cannot be based upon procedural deficiencies.

Throughout the case, the District Court viewed the fairness of the NFL's procedures as pertinent to the Sherman Act issues. In granting the Coliseum's motion for a preliminary injunction, (117a-124a) the District Court held that the NFL's location agreement was likely to be found unreasonable under the rule of reason because the three-fourths vote requirement of the NFL's

[17] In professional sports alone, the issues presented are of vital interest not only to sports leagues and their members but also to states, municipalities, public stadium authorities, and millions of taxpayers and fans. By one estimate, 70 percent of all professional sports facilities are publicly owned. R. Noll, *Government and the Sports Business* 326 (1974). In recent years, these public interests have been sharply affected by disputes or court rulings with respect to the enforceability of league location agreements in all of the major professional sports—football, basketball, hockey, and baseball. *See* cases cited in nn. 10, 22. *See also* Comment, Keeping the Home Team at Home, 74 Calif. L. Rev. 1329 (1986); J. Weistart, League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry, 1984 Duke L.J. 1013 (1984); and G. Roberts, Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry, 32 UCLA L. Rev. 219 (1984).

rule was overly restrictive and a majority vote requirement would "provide a fairer accommodation of league and individual team interests" and would be "more consistent with the traditions of our democratic society."[18] (123a)

In instructing the jury, the District Court again accepted this theory of procedural defect as an antitrust violation. Over petitioners' objection, (CR 2042) the jury was instructed that "in deciding whether or not Rule 4.3 is unreasonable," it could consider whether "there is a way of accomplishing any legitimate business purpose through a less restrictive restraint . . . ." (Tr.2d 7218) On the basis of this instruction, respondents' arguments to the jury emphasized the claimed voting defects and lack of standards in the NFL's decisionmaking process.[19]

In its liability decision, the Court of Appeals acknowledged that "[j]oint marketing decisions [by the NFL] are surely legitimate" because of circumstances unique to the operation of the NFL as a joint enterprise. (75a) The Court of Appeals then noted various factors that could properly enter into the League's consideration of a proposed team relocation—all of a type that the League had in fact considered in disapproving the Raiders' proposed relocation. (75a-77a) The League's procedure was held unlawful, however, because there was no "express recognition" in the League's rules of "objective guidelines," and because the

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[18] In so ruling, the court accepted the Coliseum's contention that the NFL procedures should require a three-fourths vote to *disapprove* rather than *approve* a team relocation. (CR 73) In attacking the NFL procedures, the Coliseum (CR 73 at 7-8) relied upon the very decisions upon which the Ninth Circuit later relied in *Northwest Wholesale Stationers*, which was reversed by this Court. *See Pacific Stationery & Printing Co.* v. *Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393, 1397 (9th Cir. 1983) (discussing Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), which applied Silver v. New York Stock Exchange, 373 U.S. 341 (1963), to professional sports leagues), *rev'd*, 472 U.S. 284 (1985).

[19] In closing argument, for example, the Raiders' counsel urged that the three-quarters vote requirement was too demanding (Tr.2d 7302-03) and that "objective" guidelines were a less restrictive alternative: "Set up these standards such as those. Put fan loyalty there, if you will, and react to that, and if there is a less restrictive alternative, you can weigh that in terms of reasonableness." (Tr.2d 7580)

League's three-quarters voting requirement did not expressly incorporate any "standards or durational limits . . . ." (77a) The court thus concluded that "[s]ome sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case."[20] (79a)

In support of its holding, the Court of Appeals relied on this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), where the Court dealt with the procedural and hearing requirements of the securities laws (79a), and on a law review article urging the application of *Silver* to sports league operations. (78a) This Court has, however, made clear in *Northwest Wholesale Stationers, supra,* that the *Silver* decision does not convert procedural irregularities into a substitute for assessing the actual competitive effects of challenged conduct. This Court in *Northwest Wholesale Stationers* concluded:

> In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process. 472 U.S. at 293.

In reliance on its *Northwest Wholesale Stationers* decision, this Court recently granted certiorari and vacated a decision of

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[20] In its decision on damages, the Court of Appeals underscored the perceived procedural defects that could have supported the jury's verdict and paid no heed to this Court's intervening decision in *Northwest Wholesale Stationers*. (28a) The Court of Appeals' reliance upon the procedural character of the violation found by the jury was confirmed by the court's explicit affirmation of the League's ownership of the Los Angeles expansion opportunity that the Raiders had seized. (24a, 28a) Accordingly, in the Ninth Circuit's view, the antitrust violation turned not on the NFL's exercise of control over the Los Angeles opportunity but on the procedure by which the NFL exercised that right.

the Court of Appeals for the Seventh Circuit that had affirmed a jury's finding of a violation of Section 1 of the Sherman Act based upon instructions permitting a jury to assess the procedural adequacy of a trade association's decisionmaking process. *Boating Industry Ass'ns* v. *Moore*, 106 S. Ct. 218 (1985), *rev'd on remand, Moore* v. *Boating Industry Ass'ns*, 1987-1 Trade Cas. (CCH) ¶ 67,568 (7th Cir. 1987).[21] There is no reason why the analysis underlying this Court's decisions in *Northwest Wholesale Stationers* and *Boating Industry Associations* is not entirely applicable where a jury is considering procedural deficiencies in a rule of reason case.

Reliance by the courts below upon procedural defects to establish an antitrust violation is even clearer here than in *Boating Industry Associations*. Respondents repeatedly attacked the adequacy of the NFL's procedures in direct testimony, cross-examination, and argument to the jury, (*e.g.*, Tr.2d 7302-03) and both Court of Appeals' decisions refer to the procedural defects as justifying the finding of violation. (28a, 77a, 78a) Given the procedural due process theory that was presented to the jury, the jury's verdict not only could have been based on an entirely impermissible ground of antitrust liability, it was actually affirmed because of procedural deficiencies. Accordingly, on that

[21] The error below in allowing a jury to find an antitrust violation based on procedural shortcomings was compounded by the lower court's reliance on the "less restrictive alternatives" standard as the basis for such a jury finding. As Raiders' counsel argued to the jury, "That's all you really need to find, a less restrictive alternative." (Tr.2d 7339) The Court of Appeals opined that the availability of a less restrictive alternative "is a pertinent factor in all rule of reason cases." (76a) In so stating, the court erroneously cited a comment by then Justice Rehnquist, in his dissent to the denial of certiorari in National Football League v. North American Soccer League, *supra*, 459 U.S. at 1079-80, that, in fact, criticized the Second Circuit for applying a "less restrictive alternatives" standard in that case. Other courts have rejected the "less restrictive alternatives" standard. *See Rothery Storage & Van Co., supra*, 792 F.2d at 229-30 n.11; American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975).

ground alone, there should be a remand as in *Boating Industry Ass'ns.*[22]

III. Allowing The Recovery Of Antitrust Damages For Indirect Losses Of A Potential Lessor Conflicts With Decisions Of Other Courts Of Appeals And This Court

The Coliseum is not a competitor of the teams engaged in the production of NFL football; nor is it a consumer of the product they produce and market. The Coliseum was in no sense a "target" of any restraint on competition that resulted from the League's refusal to approve the transfer of the Raiders from Oakland to Los Angeles. The Coliseum is simply the owner of premises in Los Angeles that it desires to rent to the Raiders.

Nonetheless, the Court of Appeals has affirmed an antitrust judgment in favor of the Coliseum for almost fifteen million dollars. In so doing, it has failed to heed the analysis of this Court in *Associated General Contractors* v. *California State Council of Carpenters,* 459 U.S. 519 (1983). In that case, this Court established guidelines designed to halt the award of antitrust treble damages as a remedy available to claimants indirectly experiencing financial loss due to some remote connection to an antitrust violation.

The court below sought to justify the grant of standing to the Coliseum by stating that "[w]e are confident that our ruling will not be misinterpreted as being a broad endorsement of antitrust standing for all parties who might have contracted with

[22] In a recent decision, a Ninth Circuit panel attempted to obscure if not disavow the reliance upon procedural due process in the two *Raiders'* decisions. National Basketball Ass'n v. SDC Basketball Club Inc., 815 F.2d 562 (9th Cir. 1987). In that opinion, the court went to great lengths to pass off the *Raiders'* decisions as not having turned on the character of NFL procedures. Despite what it acknowledged to be "painstaking efforts" in the *Raiders'* cases "to guide sports leagues toward procedures that might, in all cases, withstand antitrust analysis," (*Id.* at 568) the court denigrated the significance of those efforts. Such revisionism coming in the wake of this Court's reversal of the Ninth Circuit in *Northwest Wholesale Stationers* serves only to confirm that the decisions in this case were erroneous.

the Raiders had they not been restrained in their relocation plans." (13a) There is no principled reason, however, why many potential suppliers to the Raiders—hotels, concessionaires, printers of game programs, or parking lots—should have any less standing than has been accorded the Coliseum. All may be financially affected as much as the Coliseum by the Raiders not moving to Los Angeles for all, arguably, stand to gain financially from a transfer by the Raiders to Los Angeles. It is plainly impermissible to adopt an exception to the normal standing rules simply to permit a recovery by the Coliseum.

Even in the "stadium market" in which the Coliseum was allegedly restrained, (13a) the Coliseum's losses as a potential lessor are no more than a tangential side effect of the NFL's decision to abide by the League location agreement and to continue Raiders' operations in Oakland. Under this Court's decisions, such indirect losses do not entitle the Coliseum to sue for treble damages. In *Associated General Contractors, supra*, the Court emphasized the principle that where the "*plaintiff sustains injury from the defendant's conduct to a third person, it is too remote.*' " 459 U.S. at 532 n.25 (quoting 1 J. Sutherland, *A Treatise on the Law of Damages* 55 (1882) (emphasis in original). Thus, a key factor in *Associated General Contractors* was that the challenged restraint was imposed in one market while the plaintiff's alleged injury occurred indirectly in another business sphere. But both courts below disregarded this principle—ignoring the indirect nature of the Coliseum's loss and the absence of competition between the NFL members and the Coliseum in any market. Both courts also ignored the fact that the NFL and its members have no economic incentive to lessen competition among stadiums supplying facilities to the League's members and every incentive to encourage such competition. And neither court below found—nor could have found—that the Coliseum was a consumer itself coerced by defendants to achieve

an anticompetitive end, as was the case in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 483 (1982).[23]

The decision below is but the latest instance of the Ninth Circuit's resistance to the law respecting antitrust standing. Despite a remand by this Court for consideration in the light of *Associated General Contractors* (*see* 460 U.S. 1007 (1983), *vacating and remanding*, 670 F.2d 1378 (9th Cir. 1982)), the Ninth Circuit found a way to adhere to its original holding that an employee of an antitrust violator had antitrust standing to recover damages. *Ostrofe* v. *H. S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985). *Compare In re Industrial Gas Antitrust Litig.*, 681 F.2d 514 (7th Cir. 1982), *cert. denied sub nom. Bichan* v. *Chemetron Corp.*, 460 U.S. 1016 (1983). In *Ostrofe*, a petition for review was dismissed under Rule 53 before this Court could consider whether *Associated General Contractors* had been properly applied. 469 U.S. 1200 (1985). The tour de force thus accomplished in *Ostrofe* was the principal authority cited by the Court of Appeals in this case for permitting the Coliseum to recover.

Moreover, the decision below is in direct conflict with the Sixth Circuit's holding in *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983). There, loss of a retailer tenant by a landlord caused by a restraint in the retailing market was held to be too remote to permit the landlord to recover antitrust damages. In so holding, the Sixth Circuit followed this Court's decisions in *Associated General Contractors* and *McCready*. *See also Rosenberg* v. *Cleary, Gottlieb, Steen & Hamilton*, 598 F. Supp. 642, 645 (S.D.N.Y. 1984) (supermarket lessor, not a direct participant in retail grocery market, not

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[23] To the contrary, counsel for the Coliseum confirmed in closing to the jury that the direct impact of the League's decision was on the Raiders:

> "[The League] refused to allow the Raiders to come down here. It said if the Raiders attempt to come to Los Angeles, the League will not schedule any games with them. End of deal. If the League won't schedule any games with the Raiders down here, they can't move. And the entire agreement negotiated between [the Coliseum] and Mr. Davis is over." (32 Tr.2d 7272)

entitled under *Associated General Contractors* to challenge restraint in that market).[24]

If the award to the Coliseum stands, any party indirectly experiencing a loss of business can acquire standing to recover treble damages whenever it can identify a financial loss and characterize that loss as resulting from a competitive ripple in a "market" in which the party operates. For example, a potential lessor losing a shopping mall tenant because of a restraint in the retailing market could secure standing simply by characterizing its loss as resulting from a restraint in a "shopping mall market." On this approach, all such parties will have antitrust standing to recover treble damages in the Ninth Circuit, but not in the Sixth and other circuits. *See, e.g., Gregory Mktg. Corp.* v. *Wakefern Food Corp.*, 787 F.2d 92, 94-97 (3d Cir.), *cert. denied*, 107 S. Ct. 87 (1986) (broker lacks standing to challenge agreement between manufacturer and distributor; rejecting *Ostrofe*); *Campbell* v. *Wells Fargo Bank*, 781 F.2d 440, 442-43 (5th Cir.), *cert. denied*, 106 S. Ct. 2279 (1986) (investors lacked standing to recover for injuries that were not a direct consequence of bank's illegal tying activities); *Palazzo* v. *Gulf Oil Corp.*, 764 F.2d 1381, 1387-88 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 799 (1986) (corporate officers not directly injured by conduct of competitor oil company); *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1379 (8th Cir. 1983), *cert. denied*, 469 U.S. 870 (1984) (former shareholders lacked standing because losses indirectly related to defendants' illegal conduct). Such lack of uniformity in the enforcement of an important federal law requires either summary reversal or review and resolution by this Court.

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[24] Other circuits before *McCready* and *Associated General Contractors* had concluded that lessors whose income declined as a result of their lessee's involvement in antitrust violations do not have standing to maintain an antitrust action. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir. 1956), *cert. denied*, 355 U.S. 900 (1957). Judge Friendly expressed the view in Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), that these cases remain correct though their analysis would now be replaced by the *Associated General Contractors/McCready* analysis.

CONCLUSION

A writ of certiorari should issue to review (1) the conflict between the decisions of the Ninth Circuit and of the District of Columbia Circuit and this Court in applying the principles of ancillary restraints and the *Copperweld* analysis to intra-enterprise agreements, (2) the holding that, notwithstanding *Northwest Wholesale Stationers*, a deficiency in procedural mechanisms establishes an antitrust violation, and (3) the grant of antitrust standing to a disappointed potential lessor, despite *Associated General Contractors* and a contrary holding of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

APPENDIX A

United States Court of Appeals

NINTH CIRCUIT

Nos. 83-5907 to 83-5909
Argued Oct. 5, 1984
Submitted Nov. 8, 1984
Decided June 16, 1986

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants-Appellants.

Before:

ANDERSON and NELSON,
Circuit Judges,

and S. WILLIAMS,
*District Judge.**

NELSON, *Circuit Judge:*

We now face the second and concluding set of appeals from the district court litigation concerning the move by the Oakland Raiders professional football team (the "Raiders") from Oakland, California to Los Angeles, California. In our earlier opinion, *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984) ("*Raiders I*"), we affirmed the judgment of antitrust liability against the National Football League and its member clubs ("NFL," the "League"). Here, we (1) affirm the trebled damage jury verdict in favor of the Coliseum; (2) vacate the Raiders' antitrust damage recovery, and remand for further proceedings; and (3) reverse the judgment of liability and damages on the claim for breach of the implied promise of good faith and fair dealing.

* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts which precipitated this litigation are summarized in our earlier opinion. 726 F.2d at 1384-86.

After an initial hung jury and mistrial, the trial in this case was bifurcated. In the first portion, the jury, in separate verdicts in May 1982, found the NFL and its member clubs liable to the Los Angeles Memorial Coliseum Commission (the "Coliseum") and the Raiders for antitrust violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and to the Raiders for breach of the covenant of good faith and fair dealing implied under California law into the NFL Constitution and By-Laws (the "contract"), to which all NFL clubs are parties.

An injunction was issued in June 1982 by the district court in accordance with the antitrust liability judgment and section 16 of the Clayton Act, 15 U.S.C. § 26. This order, along with the underlying antitrust liability issues, was immediately appealed to this panel as an interlocutory order, pursuant to 28 U.S.C. § 1292(a)(1).

The damages portion of the trial commenced in September 1982. At the trial's conclusion in May 1983, the jury awarded damages on both claims, as follows: for the Coliseum, antitrust damages of $4,860,081, trebled by the district court pursuant to 15 U.S.C. § 15 to $14,580,243; for the Raiders, antitrust damages of $11,554, 382, trebled to $34,663,146, plus contract damages stipulated by the parties to equal in amount the untrebled antitrust damages, $11,554,382.

Judgment on the contract liability, which had not been entered after the liability portion of the trial, was entered after the damages phase. At that time it merged into the final judgment, which is being appealed here. *See Munoz v. Small Business Administration,* 644 F.2d 1361, 1364 (9th Cir.1981) ("[A]n appeal from the final judgment draws in question all earlier nonfinal orders and all rulings which produced the judgment.") Hence, we now review the judgment of contract liability on the

implied promise of good faith and fair dealing, as well as both the antitrust and contract damages.

Following our *Raiders I* decision in February 1984 affirming the district court judgment of antitrust liability, appellants filed a petition for certiorari with the Supreme Court. We then proceeded with the briefing and oral argument for this second set of appeals, but withdrew the case from submission pending the Supreme Court's response. On November 8, 1984, the case was resubmitted, after the Court's denial of the petition.

STANDARDS OF REVIEW

The district court denied the NFL's motions for directed verdict and for judgment notwithstanding the verdict on various issues and sub-issues now before us. We apply the same standard of review to each of these two types of ruling, and our inquiry is identical to that of the district court: viewing the evidence as a whole and in the light most favorable to the nonmoving party (the Raiders, the Coliseum), does substantial evidence support the jury's verdict or, on the contrary, is the only reasonable conclusion that can be drawn from the evidence that the moving party (the NFL) is entitled to judgment as a matter of law? *E.g., Garter-Bare Co. v Munsingwear Inc.,* 723 F.2d 707, 709 (9th Cir.), *cert. denied,* — U.S. —, 105 S.Ct. 381, 83 L.Ed.2d 316 (1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.* 668 F.2d 1014, 1026 (9th Cir.1981), *cert. denied,* 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); *California Computer Products v. IBM,* 613 F.2d 727, 732-34 (9th Cir.1979). We may not weigh the evidence and impose a result we find to be preferable as long as the jury's verdict is supported by substantial evidence. *William Inglis & Sons,* 668 F.2d at 1026.

We reivew *de novo,* however, questions of law, *e.g., United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984), as well as the district court's determination and application of state

law. *E.g., Fiorito Bros. v. Fruehauf Corp.*, 747 F.2d 1309, 1312 (9th Cir.1984).

In reviewing jury instructions to which timely objections were made, we ask

> whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. [Citations.] A court is not required to . . . amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented.

Raiders I, 726 F.2d at 1398. "A trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented" when "evaluated in the context of the whole trial." *United States v. Marabelles*, 724 F.2d 1374, 1382-83 (9th Cir.1984). A party is not entitled to an instruction on its theory of the case if that theory lacks support either in law or in the record. *E.g., Raiders I*, 726 F.2d at 1398; *United States v. Candelaria*, 704 F.2d 1129, 1132 (9th Cir. 1983).

In reviewing a jury's damages award, its "finding of the amount of damages must be upheld unless the amount is 'grossly excessive or monstrous,' clearly not supported by the evidence, or 'only based on speculation or guesswork.' " *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir.1984) (quoting *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1216 (9th Cir.1983), *cert. denied*, — U.S. —, 105 S.Ct. 1874, 85 L.Ed.2d 166 (1985)), *cert. denied*, — U.S. —, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985). In antitrust cases, a lesser level of proof is needed to support the amount of damages than to support the fact of antitrust injury; in applying this "liberal proof of damages standard," we have required only that the plaintiff provide sufficient evidence to permit a "just and reasonable estimate of the damages." *Id.; see generally J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-68 & n. 5, 101 S.Ct. 1923, 1929-30 & n. 5, 68 L.Ed.2d 442 (1981).

DISCUSSION

I. IMPLIED PROMISE OF GOOD FAITH AND FAIR DEALING (RAIDERS)

As recently reiterated by the California Supreme Court, "[i]t is well settled that, in California, the law implies in *every* contract a covenant of good faith and fair dealing." *Seaman's Direct Buying Service v. Standard Oil Co. of California,* 36 Cal.3d 752, 768, 686 P.2d 1158, 1166, 206 Cal.Rptr. 354, 362 (1984) (en banc); *see also, e.g., San Jose Production Credit Association v. Old Republic Life Insurance Co.,* 723 F.2d 700, 703 (9th Cir.1984). This covenant not only "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement," *id.,* "but also [imposes] the duty to do everything that the contract presupposes that he will do to accomplish its purpose." *Berkeley Lawn Bowling Club v. City of Berkeley,* 42 Cal.App.3d 280, 286-87, 116 Cal.Rptr. 762, 766 (1974) (quoting *Harm v. Frasher,* 181 Cal. App.2d 405, 417, 5 Cal.Rptr. 367, 374 (1960)). Even where one party retains, by virtue of the contract, a right of approval or disapproval or a discretionary power over the rights of the other, such powers must be exercised "within the parameters of the duty of good faith." *See Larwin-Southern California, Inc., v. JGB Investment Co.,* 101 Cal.App.3d 626, 639-40, 162 Cal.Rptr. 52, 59 (1979); *see also Seaman's,* 36 Cal.3d at 776, 686 P.2d at 1171-72; 206 Cal.Rptr. at 367-68 (Bird, C.J., concurring and dissenting) (good faith requires that each party act "reasonably" in light of the "justified expectations" of the other party).

Most important for the present case, this implied promise of good faith and fair dealing is "reciprocal," a "two-way street" which demands mutual compliance from the contracting parties. *E.g., Commercial Union Assurance Companies v. Safeway Stores,* 26 Cal.3d 912, 918, 610 P.2d 1038, 1041, 164 Cal.Rptr. 709, 712 (1980).

The district court provided a clear and concise statement of these principles in its jury instructions on the contract liability issue, and also instructed that "[i]f both parties have breached

this implied promise, neither can recover on it." The jury then found defendants liable for breaching the implied covenant.

We cannot find the jury's verdict on this issue to be supported by substantial evidence, and consequently must reverse the district court's decision denying judgment n.o.v. The evidence presented in this case, taken as a whole, permits only one of two conclusions: either (1) neither the Raiders nor the NFL breached the duty of good faith with respect to the contemplated franchise move from Oakland to Los Angeles, or (2) both parties so breached. Either way, the Raiders may not recover under the implied covenant. The jury's implicit conclusion, that the NFL failed to act in good faith when it refused to authorize the Raider's relocation but that the Raiders did act in good faith with respect to this issue, is not a reasonable one to be drawn from the evidence, and we find it to be untenable as a matter of law. The Raiders and their managing general partner Al Davis expressed, on various occasions prior to the vote of the NFL team owners withholding League authorization for the Raiders proposed relocation, their refusal to forego these relocation plans regardless of the wishes of the NFL. They in essence denied any contractual obligation to submit their relocation plans to the League for approval, and deliberately sought to avoid or circumvent the prescribed procedure for obtaining a vote of the other teams. In fact, the Raiders even notified the League, prior to the owners' vote, that they had officially and unilaterally "moved" to Los Angeles, had begun shipping some of their team assets south, and were thereafter to be referred to as the "Los Angeles Raiders." It cannot reasonably be maintained that the NFL's subsequent withholding of authorization, but not these actions of the Raiders, constituted a breach of the implied promise of good faith and fair dealing.

In so ruling, we have had to address a question of first impression, as the district court's crucial jury instruction quoted above relies upon a novel legal principle. No California court—and, to our knowledge, no other state or federal court—has confronted the question of mutuality of good faith responsibilities in the form in which it has arisen in the present case: where both parties

to a contract breach the implied promise of good faith and fair dealing with respect to the same affair, incident, or transaction, do the claims nullify each other so that neither party can recover for the breach, or can each bring suit to recover the damages which resulted from the other's breach? To look at it in a slightly different way, does a plaintiff's breach of the implied good faith promise constitute a defense to a suit against defendant for breach of the same implied promise, where both alleged breaches concerned the same episode in the parties' relationship, or is such a defendant's only recourse a separate counterclaim?

Because of the stark absence of case law on this issue, the reasonable policy arguments on both sides, and the possibly far reaching ramifications of whatever rule of law is adopted on this issue in California, this would have been an appropriate question of state law to have certified for decision to the California Supreme Court. *See, e.g., Aetna Insurance Co. v. Craftwall of Idaho, Inc.*, 757 F.2d 1030, 1034 (9th Cir.1985); *Meckert v. Transamerica Insurance Co.*, 742 F.2d 505, 506-07 (9th Cir.1984). Unfortunately, the State of California, unlike the majority of states in this Circuit, has not yet seen fit to follow the exhortation of the Supreme Court to legislatively create a certification process whereby its courts would be empowered to accept certain questions of state law from the federal courts. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91, 94 S.Ct. 1741, 1743-44, 40 L.Ed.2d 215 (1974). We have thus been compelled to resolve this question ourselves.

We have been motivated by several considerations to adopt a rule whereby mutual breaches of the implied good faith obligation extinguish one another. Such a rule will tend to reduce resort to formal litigation by parties engaged in contractual disputes and misunderstandings which might be characterized as breaches of the vaguely-defined duty of good faith and fair dealing by creative counsel. It will encourage, instead, settlement through constructive negotiation or alternative modes of dispute resolution, thereby not only fostering the ongoing cooperation which is a primary purpose of good faith obligations, but also

conserving judicial and social resources. Our willingness to pursue such policy goals has been influenced by the private nature of breaches of contract; we might have hesitated to follow such a course if other important public interests were directly at stake in litigation concerning the covenant of good faith and fair dealing. *See First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.*, 612 F.2d 1164, 1175 (9th Cir.) (separate counterclaim, and not mere reduction or cancellation of defendant's liability, held to be appropriate so that both public wrongs might be vindicated), *cert. denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980). Finally, we see no justice in permitting a plaintiff to complain of unfair dealing in a transaction when he himself has not fulfilled his contractual obligations with regard to that transaction in good faith. *Cf. Pond v. Insurance Co. of North America*, 151 Cal.App.3d 280, 289-90, 198 Cal.Rptr. 517, 522 (1984) ("unclean hands" doctrine; applies to suits at law as well as equity); Chafee, *Coming into Equity with Clean Hands*, 47 Mich.L.Rev. 1065, 1074-75, 1091-92, 1096 (1949).

We emphasize that our ruling does not embrace a broad rule whereby any two breaches of the implied good faith promise by opposing contracting parties constitute "offsetting penalties" which cancel each other out; our ruling applies only to factual contexts such as the present one, where both breaches concerned the same issue and occurred during one episode of the contractual relationship. *Cf. Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal.App.2d 675, 728, 39 Cal.Rptr. 64, 97 (1964) (similar limitation in "unclean hands" context); *Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 349 (9th Cir.1963) (same). Had the Raiders displayed bad faith not when and in the manner in which they did, but rather during a *different* dispute with the NFL which was unrelated to the proposed relocation of the Raiders franchise, this would not have precluded their recovery for the breach by the NFL which is involved in the present case.

On remand, the district court should reverse its denial of judgment n.o.v. for the NFL on the contract claim, and vacate

the corresponding portion of the damages judgment for the Raiders.

II. ANTITRUST STANDING

Section 4 of the Clayton Act, 15 U.S.C. § 15, broadly authorizes private damages actions under the antitrust laws: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." The class of persons entitled to obtain such damages has been limited by the Supreme Court, however, through the doctrine of "antitrust standing." *See Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 529-35, 103 S.Ct. 897, 903-07, 74 L.Ed.2d 723 (1983).

The requirements of antitrust standing are greater than those of standing in its ordinary, constitutional sense. *Id.* at 535 n. 31, 103 S.Ct. at 907 n. 31; *Bubar v. Ampco Foods, Inc.,* 752 F.2d 445, 448 (9th Cir.), *cert. denied,* — U.S. —,105 S.Ct. 3481, 87 L.Ed.2d 616 (1985). The Supreme Court, eschewing mechanical tests of antitrust standing frequently employed by courts, has specified certain factors which are to be evaluated on a case-by-case basis in order to determine whether a plaintiff who has suffered an injury which bears a causal connection to the alleged antitrust violation also satisfies the more demanding antitrust standing standard: (1) the motive of the defendant—whether it specifically intended to cause plaintiff's harm; (2) the nature of plaintiff's injury—whether it was of a type the antitrust laws were designed to prevent; (3) the directness of the causal connection between the violation and the injury; (4) the extent to which abstract speculation underlies the allegations of injury and of their causation by defendant's antitrust violations; and (5) the risk of duplicate recoveries or complex apportionment of damages if plaintiffs such as this are permitted to recover. *Associated General Contractors,* 459 U.S. at 537-45, 103 S.Ct. at 908-12; *Bubar,* 752 F.2d at 449.

Appellants seek to persuade us, by focusing upon two of these factors in particular, that the Raiders and the Coliseum lack antitrust standing to recover treble damages from the NFL under 15 U.S.C. § 15. In basing their argument upon only some of the factors, appellants implicitly assume that a favorable finding on each and every one of the above factors is a necessary precondition to a finding of antitrust standing. We reject any such implication. Most cases will find some factors tending in favor of standing (to a greater or lesser degree), and some against (also in varying degrees), and a court may find standing if the balance of factors so instructs. *See Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 741 (9th Cir.1984) (discussing *Associated General Contractors*), *cert. dismissed*, — U.S. —, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 965 (3d Cir.1983), *cert. denied*, 465 U.S. 1024, 104 S.Ct. 1278, 79 L.Ed.2d 682 (1984). Thus, ordinarily, we will not narrowly address arguments offered against a plaintiff's standing by examining only those factors pointed to by defendants. In the present case, however, we find appellants' particular contentions to be without merit, and so do not analyze the remaining factors in detail.

A. The Nature of the Injury: *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*

The NFL contends that the injuries suffered by the Raiders and the Coliseum were not of a type the antitrust laws were intended to prevent, basing its argument upon *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). There, the Court denied a treble damages cause of action to a group of bowling centers, for an alleged violation of section 7 of the Clayton Act. The bowling centers suffered economic harm when Brunswick acquired, and thereby facilitated the continued operation of, a number of their financially ailing competitors. After noting that plaintiffs were in essence complaining not that Brunswick had reduced competition, but that it had actually preserved it, the Court stated that recovery could be had only for injury "that flows from that which

makes defendants' acts unlawful" and that "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 489, 97 S.Ct. at 697, *quoted in Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482, 102 S.Ct. 2540, 2550, 73 L.Ed.2d 149 (1982). We have stated that the *Brunswick* standard is satisfied "on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts." *California Computer Products v. IBM*, 613 F.2d 727, 732 (9th Cir.1979).

The NFL's basic contention is that appellees never proved that their injuries were caused by the restraint of competition which flowed from the antitrust violation in this case. This argument is a curious one, and is predicated upon an unduly narrow concept of "competition."

The NFL apparently conceives of competition as something to be uniformly avoided by all rational business enterprises. The League seems to argue that the only losses of appellees which are compensable under *Brunswick* are those which require for their description some reference to the Los Angeles Rams, the other football team in the city to which the Raiders sought to relocate. Any losses merely attributable to the prevention of the relocation—attributable, that is, to the inability of the Raiders to operate in the desired regional market, and to the Coliseum's inability to lease its facility to the Raiders for their football games—supposedly do not constitute "antitrust injury" because, the NFL argues, they do not flow from the prevention of competition between the Raiders and the Rams.

The NFL's effort to thus unduly restrict the range of antitrust impact is rejected. "Competition," in the business context, need not, and in fact usually does not, involve any measures which expressly acknowledge, let alone take aim at, other competitors. One competes in a market merely by operating an enterprise in it. Competition, therefore, is not always dreaded by business people; indeed, it is often avidly sought by those who do not yet operate in a potentially lucrative market.

Appellants are liable for antitrust damages because they restrained competition between NFL teams and among football stadia by restraining the Raiders attempt to move and *operate* in Los Angeles. Merely by operating there, the Raiders would have been competing with the Rams, and the Coliseum would have been able to bid effectively for a professional football team as its tenant. The restraint of this competition constitutes a sufficient basis for treble damages relief under *Brunswick*.

The NFL makes much of the fact that appellees' damages claims made no reference to the Rams or to the effect that the presence of the Rams would have upon appellees' income and expenses. But any evidence of lost profits implicitly accounted for the Rams, and the NFL should have introduced contrary evidence if it felt that the presence of the Rams rendered the Raiders' or Coliseum's figures inaccurate. Moreover, the less the Rams' presence influenced the amount of appellees' lost profits, the greater the indication that the football and stadium markets could have tolerated more freedom of movement for NFL teams and have functioned in an economically inefficient manner due to the territorial restrictions.

Finally, the NFL complains that the district court's jury instructions on this issue were insufficient. We disagree. The court expressly instructed the jury that the Raiders and the Coliseum could not recover damages unless they met their burden of proving, by a preponderance of the evidence, "that the injury was the result of a restriction in competition." *Cf. Handgards, Inc. v. Ethicon,* 743 F.2d 1282, 1296 (9th Cir.1984) (approved instruction that losses not recoverable if caused by increase in competition), *cert. denied,* — U.S. —, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985).

B. *Directness of the Injury (Coliseum)*

Appellants contend that the injury suffered by the Coliseum was connected too remotely and indirectly to the NFL's antitrust violation to be compensable under 15 U.S.C. § 15. We find this argument to be without merit.

We determined in *Raiders I* that the "claims of the Raiders and the L.A. Coliseum ... present somewhat different market considerations." 726 F.2d at 1393. Upholding the jury's liability verdict in favor of both parties, we found sufficient evidentiary support for the jury's finding that the NFL's territorial restraints in this case not only impaired competition between NFL football team franchises, but also restrained competition in the "stadia market" between rival stadia (such as the Oakland Coliseum and the L.A. Coliseum) that seek to secure NFL tenants. *Id.* at 1393-94.

Clearly, the Coliseum suffered direct harm as the result of the NFL's antitrust restraints in that latter market. Unlike the alleged injury found to be too indirect by the Court in *Associated General Contractors*, the Coliseum's injury was not filtered through "several somewhat vaguely defined links." 459 U.S. at 540, 103 S.Ct. at 910. The Coliseum was a competitor in a market in which competition was directly and quite foreseeably, if not also intentionally, restrained. This stadium, which had previously sought to acquire the Minnesota Vikings team as a tenant, was engaged in a bidding struggle with its Oakland counterpart for the tenancy of the Raiders, and was injured when the NFL's application of its territorial restrictions foreclosed further undistorted negotiations.

We are confident that our ruling will not be misinterpreted as being a broad endorsement of antitrust standing for all parties who might have contracted with the Raiders had they not been restrained in their relocation plans. Football stadia constitute a special market distinguished from those comprised by, say, hotels, laundering establishments, or limousine services, by their indispensable and intimate connection with professional football and football teams. An injury such as that suffered by the Coliseum in the present case cannot fairly be characterized as an indirect "ripple effect."

The district court was correct in denying appellants' motion to dismiss the Coliseum's damages claim for lack of standing.

III. DAMAGES: SUFFICIENCY OF THE EVIDENCE

As indicated above, we undertake only limited review of jury damages awards, in order to avoid encroaching upon the jury's proper function under the Constitution. The NFL launches various assaults upon the sufficiency of the evidence, but we find nothing in these to justify any interference with the damages verdicts. After examining the record in light of the NFL's contentions on appeal, we conclude that the jury's awards are supported by substantial evidence, and are neither grossly excessive nor based upon mere speculation.

While we do not respond explicitly to each of the NFL's many allegations of error, we do note the NFL's arguments that the Raiders and the Coliseum failed to prove the requisite causal links between the NFL's antitrust violation and certain elements of the alleged damages. Recovery will not be permitted for injuries which have been independently caused by something other than the antitrust violation. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-28, 89 S.Ct. 1562, 1578-79, 23 L.Ed.2d 129 (1969). However, a plaintiff need not prove that the antitrust violation was the only cause of its injury in order to recover damages under 15 U.S.C. § 15; proof that the violation was a material cause is sufficient. *Id.* at 114 n. 9, 89 S.Ct. at 1571 n. 9; *William Inglis & Sons*, 668 F.2d at 1051.

In the present case, the jury's implicit findings of causation of damages were generally supported by substantial evidence. The only possible instances where appellees' submitted damages estimates may have been unfounded because of a lack of proof of causation were their claims for lost profits that would have been earned had luxury stadium boxes been built in the Coliseum and rented for the Raiders' 1980 football season, and perhaps also part of the Raiders' claim for the "reduced value" of a loan whose receipt was delayed as a result of the NFL's violation.

Even if we eliminate these questionable elements of appellees' claims, however, the jury had before it sufficient evidence, including the attendance and seat price estimates offered by the Raiders, on which to reach the damages amounts it awarded to both parties. Even a total inadequacy of proof on isolated elements of damages claims submitted to a jury will not undermine a resulting aggregated verdict which is nevertheless reasonable in light of the totality of the evidence. If we find that a jury's damages award exceeds the maximum amount sustainable by the probative evidence, we will not hesitate to order a remission of the excess by the plaintiff or, in the alternative, a new trial. *See D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir.1982); *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 602-03 (9th Cir.1983). But where, as here, the jury's verdicts find substantial support in the record and lie within the range sustainable by the proof, we will not "play Monday morning quarterback" and supplant the jury's evaluation of the complex and conflicting evidence with our own. *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 80-81 (1st Cir.1984); *see, e.g., W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 746 F.2d 215, 219 (3d Cir.1984).

IV. DAMAGE OFFSETTING RULE (RAIDERS)

Written by District Judge WILLIAMS with Circuit Judge NELSON dissenting.

In accordance with the analysis contained in Parts II and III of this opinion, the jury could properly have found that the amount of the Raiders' lost profits from the delay of two years in moving to Los Angeles amounted to $11,554,382. However, we conclude that the district court erred in limiting the NFL's damage offset defense, when it excluded from the jury's consideration in calculating damages the benefits the Raiders realized by taking from the NFL the opportunity to establish an expansion franchise in Los Angeles.

Two related offset theories are potentially applicable to this case. The fault-based offset theory, premised on *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140, 88 S.Ct. 1981, 1985, 20 L.Ed.2d 982 (1968), provides that the "beneficial byproducts" of an illegal restraint to which the plaintiff is a party should be offset against the damages incurred by plaintiff which resulted from the restraint. The second theory, which does not depend upon a plaintiff's culpability, is based on general principles of damages which limit a plaintiff's recovery under the antitrust laws to compensation for the "net" injury incurred as a result of the defendant's antitrust violation. Under this theory, in order to put a plaintiff in the position it would have been, absent the defendant's antitrust violation, the plaintiff's gross recovery for the antitrust violation must be reduced by any benefits that plaintiff would not have received had there been no anticompetitive conduct by the defendant, or, more generally, by amounts which are unnecessary to fully compensate a plaintiff for the adjudicated violation. The relevant inquiry is "what plaintiff's situation would have been in the absence of the defendant's violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 566, 101 S.Ct. at 1929.

Although distinct, the two offset theories are based on the same underlying objective: avoiding overcompensation of plaintiffs through awarding damages beyond the actual extent of their injuries. The theories differ in that, under *Perma-Life*, the benefits to be offset accrued to the plaintiff *because of* its status as a party to the defendant's illegality, whereas under the second theory, the plaintiff's role is essentially irrelevant. The court's task under the latter theory is to award damages to put the plaintiff into the position it would have been, absent the antitrust violation. This requires a deduction for benefits that would not have accrued to plaintiff in the absence of the violation, or for claimed damages which exceed the scope of the defendant's liability. The parties' briefs do not clearly distinguish between these two types of offsets, apparently treating them as one. However, because the two theories differ in their application, we

examine them separately in order to apply them correctly to this case.

The *Perma-Life* offset arises where the plaintiff was a party to the defendant's antitrust violation. In such situations, the "beneficial byproducts of a restriction [of competition] from a plaintiff's point of view" are to be offset against the plaintiff's damages resulting from the restraint. *Perma-Life*, 392 U.S. at 140, 88 S.Ct. at 1985. In *Perma-Life*, the Court held that a plaintiff's participation in the defendant's antitrust violation could not constitute a total bar to liability for the violation, under the equitable doctrine of *in pari delicto*. Rather, the court stated, the benefits realized by the plaintiff from the restraint should be deducted from plaintiff's gross antitrust damages in order to arrive at the amount representing the extent of plaintiff's actual (net) injury from the illegal restraint. *Id. See, e.g., Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 695 (5th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976), II P. Areeda & D. Turner, *Antitrust Law* at 255 (1978).

The second, non-fault based offset theory is simply a corollary of the general principle, applicable outside the antitrust context, that an award of damages should put a plaintiff forward into the position it would have been "but for" the defendant's violation of the law. A plaintiff's antitrust damages are to be calculated "by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946). *Accord, J. Truett Payne*, 451 U.S. at 566, 101 S.Ct. at 1929. The inquiry involves a comparison of "the plantiff's actual situation with the hypothetical situation that would have existed in the absence of the violation." II Areeda & Turner, *supra* at 229. Under this theory, the ultimate relief awarded must take into account any benefits which would not have been received by plaintiff "but for" the defendant's anticompetitive conduct, or amounts a plaintiff would have expended in the absence of the violation. An antitrust plaintiff may recover only to the "net"

extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct.

This principle is aptly illustrated by the case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), which affirmed a district court's reduction of damages by the amount the plaintiff would have been required to expend in the absence of defendant's illegal restraint of trade. In *Hanover Shoe*, the defendant's practice of leasing and refusing to sell its more complicated and important shoe machinery was found to be an illegal act of monopolization. Because the plaintiff would have bought rather than leased the machinery from the defendant had it been given the opportunity to do so, the Court offset against the plaintiff's gross antitrust damages (the rental price paid for leasing the machines) the amount plaintiff would have paid to purchase the machines absent the "lease-only" restraint of trade. *Id.* at 487, 88 S.Ct. at 2228. This same offset principle was also applied later in the opinion, when the Court affirmed the district court's deduction from antitrust damages of the cost of capital that the plaintiff would have incurred had it been able to purchase defendant's machines. Because of defendant's illegal insistence on leasing rather than selling its product, plaintiff was able to avoid the capital cost it would have incurred in buying the machines (the interest rate at which it would have been able to obtain the capital to purchase the machines). *Id.* at 503-04, 88 S.Ct. at 2236-37. Placing plaintiff in the position it would have been, absent the antitrust violation, thus required deducting from gross damages the amounts plaintiff would have expended if defendant had been willing to sell the machinery to plaintiff.

This netting rule reflects the more general requirement that an antitrust plaintiff recover only for "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489, 97 S.Ct. at 697 (emphasis in original). Under *Brunswick*,

the essential inquiry is whether the damages sought by the plaintiff are for injuries which flow from the defendant's anticompetitive conduct. Relief which is beyond the scope of an adjudicated antitrust violation may not be awarded. As shall be discussed in more detail below, just as it is necessary to deduct from a gross damage recovery the benefits a plaintiff would not have received absent an antitrust violation, the *Brunswick* rule requires that the gross relief awarded for an antitrust violation be offset by amounts which are not attributable to the defendant's illegal conduct. A "plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne*, 451 U.S. at 562, 101 S.Ct. at 1927.

Determining how these offset mechanisms apply to the facts of this case depends in part upon which of two alternative interpretations of the liability verdict, relating to the precise nature of the NFL's antitrust violation, are correct. The first alternative, proposed by the NFL, construes the liability jury's general verdict in favor of the Raiders as a finding that Rule 4.3 *by itself* was an illegal restraint of trade. The second alternative, urged by the Raiders, construes the verdict to have found Rule 4.3 invalid only as it was applied to prevent the Raiders from moving from Oakland to Los Angeles. Both the NFL and the Raiders appear to assume that a decision between these alternatives will necessarily determine the larger question of whether the district court erred in limiting the NFL's offset defense. However, as the discussion below demonstrates, the NFL's offset evidence was improperly restricted by the district court under *either* interpretation of the verdict. Each alternative will be considered in turn.[1]

[1] Because the two views of the verdict ultimately lead to a divergence with respect to the amount of the Raiders' benefits that should be offset against their damages, it is necessary to decide which interpretation of the liability verdict is correct. *See infra* at 1369. However, we discuss both alternatives in order to more clearly illustrate the parameters of the two offset theories at issue in this case.

A. *Alternative I: Rule 4.3 Illegal by Itself*

Assuming first that Rule 4.3 by itself was found by the liability jury to have been illegal, then the Raiders, by virtue of their participation in the continued existence of Rule 4.3 during their years in the NFL, were parties to that restraint along with the other NFL clubs, at least until the Raiders challenged the rule in 1980. If the Raiders were parties to the restraint, a straightforward application of the *Perma-Life* rule would require all benefits accruing to the team from Rule 4.3's territorial restrictions to be offset against their damages. The NFL's offer of proof with regard to the offset defense noted three types of benefits that the Raiders received from Rule 4.3 over the years: (1) increased television revenues because of the stable geographic dispersal of franchises, (2) benefits from the Oakland community due to the seeming stability fostered by Rule 4.3, and (3) the preservation of the Los Angeles expansion opportunity which the Raiders eventually moved into.

We can see no principled argument that could preclude application of the *Perma-Life* rule to the facts of this case, given the assumption that the liability verdict found Rule 4.3 to be illegal over the years the Raiders belonged to the NFL. If Rule 4.3 was illegal and the Raiders were a party to that illegality, then the benefits flowing to the Raiders from that restriction on competition would have to be offset against the Raiders' damages to the full extent proposed by the NFL. Accordingly, were we to adopt the NFL's construction of the jury's liability verdict, the *Perma-Life* theory would require that we vacate the district court's damage award and remand for consideration of the amount of the benefits received by the Raiders that should be offset against their lost profits.[2]

B. *Alternative II: Rule 4.3 Illegal Only as Applied to Raiders' Move*

Although the above-described interpretation of the verdict is plausible, it is ultimately inconsistent with the actual history of this case. The Raiders' construction of the verdict—that Rule

[2] Because the *Perma-Life* theory would require such an offset, it would be unnecessary to inquire into the effect of the *Hanover Shoe* type of offset under this interpretation of the verdict.

4.3 was found to be invalid only as it was applied to the Raiders' proposed move to Los Angeles—finds much greater support in the record than does the NFL's version. The liability jury was instructed that "the overriding issue you are asked to decide is whether Rule 4.3 as applied to this case is an unreasonable restraint of trade under Section 1 of the Sherman Act." 32 Tr.2d 7211.[3] Moreover, while the evidence heard by the liability jury could support either construction of the verdict, it is consistent with the principles of res judicata to interpret the verdict to have decided only what was necessary to have reached its general verdict for the Raiders. In concluding as it did, the jury need not have reached the broad issue of the legality of Rule 4.3 by itself; they need only have found it invalid as it was applied to the Raiders' move. Such an interpretation of the verdict is consistent with that of the trial judge, who indicated his agreement in so limiting the final equitable decree permitting the Raiders to move to Los Angeles.[4] Moreover, we affirmed the liability judgment in *Raiders I* only after examining the particular anticompetitive conduct and markets involved in the circumstances of the Raiders' contemplated move. *See Raiders I* at 1395-98. Accordingly, we find that the Raiders' interpretation of the liability verdict is correct, and thus construe the verdict to have held Rule 4.3 invalid only as it was applied to the Raiders' proposed move to Los Angeles. We therefore analyze this second alternative in greater detail, below.

If, as we have decided, Rule 4.3 was not illegal until it was applied to the Raiders' move, than the Raiders were not a party to an illegal restraint over the years, and the benefits accruing to them by reason of that restraint were not the beneficial byproducts of an antitrust violation. Therefore, the fault-based *Perma-Life* theory simply could not be applied to offset the benefits received by the Raiders over the years from Rule 4.3. However,

[3] "T.R.2d" refers to the reporter's transcript of the second liability trial and damages trial. "C.R." identifies documents contained in the district court record, listed by the docket numbers assigned by the Clerk of that court.

[4] Final Decree, C.R. 2090 (June 14, 1982). The trial judge rejected the broad decree sought by the Raiders, which would have prohibited the NFL from enforcing Rule 4.3 in any form or context. *See* C.R. 2073.

application of the *Hanover Shoe* offset mechanism in light of this construction of the liability verdict provides a quite different outcome.

As indicated above, the *Hanover Shoe* offset rests on the principle that, to put the plaintiff into the position it would have been, absent the defendant's antitrust violation, benefits that would not have been received by the plaintiff had there been no violation, or amounts which represent a recovery beyond the scope of the adjudicated antitrust liability, must be offset against the gross relief awarded. This offset principle has been applied in a variety of antitrust cases, both in this Circuit and elsewhere.

In the seminal case of *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir.1971), *cert. denied*, 405 U.S. 955, 92 S.Ct. 1173, 31 L.Ed.2d 232 (1972), the defendant franchisor was found to have illegally tied the sale (to its franchisees) of equipment and supplies, to the licensing of defendant's "Chicken Delight" trademark. The defendant did not charge its franchisees (the plaintiffs) directly for the use of the trademark, but instead required the purchase of the equipment and supplies as a condition of the use of the trademark. The district court awarded as damages for this illegal tying arrangement the full amount plaintiffs were overcharged for the tied items (the equipment and supplies). This court reversed the damage award, holding that the gross damage amount should have been offset by the "reasonable value [of] the Chicken Delight license." *Id.* at 52. In other words, in order to put the plaintiffs into the position they would have been, absent the illegal tie, the overcharges on the tied items should have been reduced by the amount plaintiffs would have paid for the license in the absence of the unlawful restraint. This court's decision was simply a recognition of the fact that if the defendant had not required the purchase of the equipment and supplies, it would have (legally) charged plaintiffs for the right to use the trademark. Plaintiffs were not entitled to both their damages from the overcharges on the tied products *and* access to the typing products free of charge. Rather, we directed that the plaintiffs' damage award be reduced by the amount plaintiffs would have paid for the use of the trademark, in the absence of

the antitrust violation. As we stated, "the cost or value of the products involved, free from the unlawful arrangement, must first be ascertained." *Id. See also Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d 380, 385-86 (4th Cir.1982), *cert. denied*, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983) (offsetting against plaintiff's gross damages "the amount which plaintiffs would have paid . . . in the absence of the royalty-maintenance conspiracy").

This offset mechanism may also be utilized to reduce a damage award where a portion of that award includes damages which go beyond the scope of adjudicated antitrust liability. Consistent with *Brunswick*, any damages awarded must be attributable to conduct which violated the antitrust laws. Where a plaintiff's recovery flows from conduct which has been found to be legal in part and illegal in other respects, *Brunswick* requires that the award be reduced to reflect a recovery only for that conduct found to be illegal under that antitrust laws. Thus, in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980), the district court's damage award included a recovery not only for the defendant's anticompetitive actions, but also for certain of its practices that were legal. The Second Circuit reversed, holding that the damage recovery should have compensated the plaintiff only for that portion of the defendant's conduct which was found to be illegal. The court emphasized that the Sherman Act does not require a party "whose position has for the most part been attained legitimately . . . to forfeit all fruits of its success because its power has merely been supplemented by improper conduct." *Id.* at 298. Similarly, in *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), the plaintiff premised its damage study on conduct of the defendant that was later found to be partially lawful and partially anticompetitive, and provided no means for the jury to separate out damages resulting from the illegal conduct. The Seventh Circuit vacated the resulting damage

award, requiring that the award be limited to "the *illegal* practices of the defendant." *Id.* at 1161 (emphasis in original). "To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful." *Id.* at 1162-63. *Accord, ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F.Supp. 423, 434 (N.D.Cal.1978), *aff'd sub. nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir.1980) (per curiam), *cert. denied*, 452 U.S. 972, 101 S.Ct. 3126, 69 L.Ed.2d 983 (1981), *Allegheny Pepsi-Cola v. Mid-Atlantic Coca Cola*, 690 F.2d 411, 415 (4th Cir. 1982), *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir.1975).

In light of these authorities, it becomes our task to compare the relative positions of the parties, before and after the application of Rule 4.3 in order to reconstruct what the Raiders' position would have been in the absence of the NFL's antitrust violation. We thus must determine whether any benefits were received by the Raiders that would not have belonged to them had Rule 4.3 not been improperly applied to their contemplated move to Los Angeles, or whether the relief awarded extends beyond the scope of the antitrust liability found by the jury.

Prior to 1980, the NFL as a whole owned the right to expand into the Los Angeles area. As evidence at both phases of the trial in this case demonstrated, the Los Angeles opportunity represented an extremely valuable expansion possibility for the league. *See* Stanford Research Institute Study (Plaintiff's Exhibit 48). The value of the Los Angeles opportunity arose not only from the economic potential of one of the nation's largest media markets, but also from the NFL's well-established and widely followed nationwide entertainment product. That product had developed over the years into a geographically diverse structure of teams, with traditions, rivalries, well-known players and national media interest, all of which greatly enhanced the value of any expansion opportunity. If and when the NFL placed an expansion team in the Los Angeles area,[5] the accumulated value of the Los Angeles opportunity would have been realized by the NFL through

[5] The Rams, by this time, were playing in Anaheim.

charging the new expansion team owner for the expansion opportunity. *See, e.g.*, 16 Tr.2d 3148-49.

As indicated above, the value of the league's expansion opportunities belonged to the league as a whole, or in other words, was owned in part by each franchise owner. Unquestionably, when the Raiders moved to Los Angeles, they appropriated for themselves the expansion value that had accumulated in Los Angeles. Although by moving out of Oakland the Raiders "gave back" an expansion opportunity to the NFL, the uncontradicted testimony at trial showed the Los Angeles market to be a significantly more lucrative franchise opportunity. Indeed, the Raiders' managing general partner, Al Davis, testified that the Raiders increased their value by some $25 million by moving to Los Angeles. 26 Tr.2d 5562, 59 Tr.2d 11578. *See also* 16 Tr.2d 3115.

If, as the Raiders contend and we have found, the jury decided that Rule 4.3 was illegal only as it was applied in 1980, then the NFL's development of the Los Angeles expansion opportunity until 1980 cannot be said to be illegal in the eyes of the antitrust laws. Thus, at least as far as the law of this case is concerned, the NFL legitimately possessed the value of that expansion opportunity that had accrued until 1980. (Note that if the jury *had* found the NFL's development of the Los Angeles opportunity through 1980 to be illegal, the Raiders, as a party to that illegality, would then have been fully subject to the *Perma-Life* offset. *Supra* at 1368.) By finding that the NFL violated the antitrust laws through its application of Rule 4.3 in 1980, the liability verdict gave the Raiders only the right to play football in Los Angeles from 1980 forward. Because the verdict did not find Rule 4.3 illegal over the years, it did not mandate an award to the Raiders of the value of the Los Angeles opportunity that had accumulated prior to 1980. The verdict did entitle the Raiders to the right to play in Los Angeles on into the indefinite future, and to damages for lost profits from the two years the Raiders remained in Oakland after the NFL improperly refused to permit their move. However, because the NFL's cultivation of the Los Angeles opportunity until 1980 was not found to violate the antitrust laws, an award of that opportunity to the Raiders would

constitute a recovery for conduct of the NFL which was not found to be illegal. Under *Brunswick*, the accumulated value of that business opportunity is not something to which the Raiders became entitled as a result of the liability verdict. As a result, the injunction permitting the Raiders to play NFL football in Los Angeles provided them with a windfall benefit beyond the scope of the antitrust verdict.

Although this overbroad injunctive relief may have been appropriate because such an equitable remedy was at the core of this litigation, the principles of *Brunswick* and *Berkey Photo* require that this windfall be taken into account when awarding *additional* damages beyond the injunctive relief. Specifically, the Raiders' additional damage award (for lost profits from the two years the NFL prohibited their move to Los Angeles) should be offset to the extent their injunctive relief exceeded the scope of the antitrust verdict. As the situation stands pending this appeal, the Raiders have been awarded both the portion of the Los Angeles opportunity that had been legitimately possessed by the NFL, and additional monetary damages. To limit the Raiders' recovery to their injury flowing from the NFL's adjudicated violation, it is necessary to offset the Raiders' damage award against the excess portion of the injunctive relief, until that excess is fully exhausted. Then, and only then, may additional monetary damages be awarded consistent with *Brunswick* and its progeny. To do otherwise would in effect permit the Raiders to recover for conduct of the NFL that did not violate the antitrust laws. To paraphrase *Berkey Photo*, "instead of being required simply to compensate [the plaintiff] for the consequences of its wrongful action, [the NFL] would be required to forfeit its legitimately acquired advantage." 603 F.2d at 298.

Rather than remand for an entirely new trial on the question of damages, as was necessary in *Berkey Photo* and *MCI*, it is possible in this case to utilize the jury's calculations of gross damages as a component of the damage-netting mechanism exemplified in *Hanover Shoe* and *Siegel*. Because the Raiders' gross damages from their two year delay in moving to Los Angeles have been, as we have found, properly determined, the

remaining task for the district court on remand will be to calculate the value of the Raiders' injunctive relief that exceeded the scope of the liability verdict, and offset that value against the Raiders' monetary award. As indicated above, the excess portion of the injunctive relief can be measured as the value of the NFL's Los Angeles expansion opportunity in 1980, prior to the NFL's illegal conduct, less the value of the Oakland opportunity returned to the league.

Another way of looking at the application of this offset to the facts is through a comparison of the Raiders' actual situation "with the hypothetical situation that would have existed" had there been no antitrust violation. II Areeda & Turner, *supra*, at 229. As indicated above, it was the NFL's customary practice to charge owners of new franchises for the expansion opportunity received. The price charged new franchisees reflected the value of the expansion opportunities being provided. For instance, the price charged for an expansion team doubled in the years from 1966 to 1976, from $8.5 million to $16-17 million.[6]

If the NFL had voted in favor of the Raiders' move to Los Angeles in 1980, it would have been justified in imposing an analogous charge on the Raiders to account for the excess value of the Los Angeles opportunity the Raiders were receiving over the "Oakland opportunity" that was being returned to the league. In other words, the amount of compensation sought by the NFL might reasonably have reflected the difference between what it could have obtained from a new franchisee in Los Angeles, and a new franchisee in Oakland. In the absence of the NFL's antitrust violation, the Raiders would have been playing football in Los Angeles, but would have been required to compensate the NFL for the excess value of the Los Angeles opportunity.

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[6] 16 Tr.2d 3010; *Antitrust Policy and Professional Sports: Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 276 (1981-82).

Application of this offset rule is consistent with, and indeed, virtually compelled by this court's *Raiders I* opinion. In analyzing the "unique" nature of professional athletic leagues vis-a-vis the antitrust laws, this panel expressly acknowledged that "the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture *and to secure each venturer the legitimate fruits of that participation.*" *Raiders I* at 1396 (emphasis added). Here, the league owners collectively possessed the value that had accumulated in the Los Angeles expansion opportunity. This value, as indicated above, was created at least in part through the NFL's development, over the years, of a popular spectator sport with a national following. Although this panel upheld the liability jury's conclusion that Rule 4.3 as it was applied to the Raiders' move was an unreasonable restraint of trade, the opinion noted several less onerous forms of territorial restrictions that could pass muster under the rule of reason. Among these were standards restricting team movement that expressly recognized certain objective factors such as population, economic projections and the like, that the league could legitimately consider in deciding whether to permit a team to move. *Id.* at 1397. If such restrictions, applied in a non-arbitrary manner, would be reasonable under the Sherman Act, then *a fortiori,* a rule requiring merely an objectively-determined payment to league members as compensation for the right to take a valuable, jointly-owned franchise opportunity out of the league's hands, would also be a reasonable restriction.

Thus, by taking possession of the Los Angeles expansion opportunity from the NFL, the Raiders reaped a windfall benefit beyond the scope of the antitrust verdict. For this reason, and also because the NFL, in the absence of its antitrust violation, would have been justified in requiring the Raiders to compensate the NFL for the excess value represented by the Los Angeles expansion opportunity,[7] that excess value should have been offset against the Raiders' lost profits from the two years they were

[7] In footnote 1 of her dissenting opinion, Judge Nelson suggests that our offset analysis is dependent upon an assumption that the NFL would have charged the Raiders for the excess value represented by the Los Angeles opportunity. However, this assumption is raised only as an alternative to our primary

precluded from moving to Los Angeles. The district court therefore erred in refusing to admit evidence of the full benefits of the Los Angeles expansion opportunity received by the Raiders, and in refusing to instruct the jury on the NFL's offset defense. The court incorrectly limited the NFL's offset evidence in this regard to the "negotiating advantage" the Raiders received during the 1980-82 period by virtue of the fact that Rule 4.3 discouraged other teams from moving to Los Angeles during that period. On remand, the scope of the offset should be broadened to include the full value of the Los Angeles opportunity that had accrued prior to 1980, less the value of the "Oakland opportunity" that was returned to the NFL.

The district court was correct, however, in refusing to admit evidence of the other benefits the NFL sought to offset against the Raiders' damages. The increased television revenues attributable to Rule 4.3, as well as the benefits received from the Oakland community over the years as a result of Rule 4.3, are benefits that would have accrued to the Raiders even if Rule 4.3 had not been illegally applied to prevent the Raiders' move to Los Angeles. For the same reason, these benefits do not represent a windfall recovery beyond the scope of the antitrust verdict. Placing the Raiders in the position they would have been, absent the NFL's improper application of Rule 4.3, does not require deduction of these benefits from the Raiders' gross damages.

Although the Raiders protest that any offset of their damages is inconsistent with the policy of the antitrust laws to encourage private lawsuits, it is beyond dispute that the Sherman Act was not intended to provide recoveries, before trebling, in excess of the injuries that were actually caused by an antitrust violation. *Brunswick*, 429 U.S. 477, 97 S.Ct. 690. Moreover, even assuming that their award of monetary damages will be wholly offset, there is nothing necessarily wrong with "a damage assessment producing no net recovery," where that is a "result commanded by the necessity of offsetting injuries which plaintiffs may have suffered at the hands of defendants with benefits which they may

holding, that the relief awarded the Raiders is beyond the scope of the adjudicated antitrust liability, and for that reason should be offset.

have derived from the very activities they attack." Areeda, *Antitrust Violations Without Damage Recoveries,* 89 Harv.L.Rev. 1127, 1136 (1976). *See also* II Areeda & Turner, *supra* at 257 (prospect of injunctive relief is the appropriate incentive for plaintiff to bring suit when antitrust "damages cannot be awarded [because] they don't exist"). As indicated above, by moving to Los Angeles the Raiders received not only what the liability verdict entitled them to—the right to play football in Los Angeles from 1980 forward—but also the windfall benefit of the Los Angeles expansion opportunity that had legitimately belonged to the NFL as a whole prior to 1980. In order to accurately calculate the Raiders' net injury from the antitrust violation, their lost profits from 1980-82 must be reduced by the value of the injunctive relief awarded by the district court which exceeded the scope of the liability verdict. No case cited by the Raiders stands for the proposition that encouragement of antitrust suits requires a damage recovery (before trebling) to go beyond the extent of the plaintiffs' actual injury.

Similarly, we are not persuaded that antitrust policy requires that the offset amount be deducted from an already trebled gross damage award. Rather, as in *Siegel* and *Hanover Shoe*, the reduction should occur prior to trebling. An antitrust plaintiff is entitled to a trebled recovery, but only treble the amounts which are necessary to compensate it for the injury caused by the defendant's violation. The plaintiff's damages consist of either its lost profits caused by the antitrust violation or the value of the business that it is deprived of by the defendant's illegal conduct. One injured by an antitrust violation may not recover both measures of relief, because the value of the business "necessarily take[s] into consideration its future profit-earning potential." *Albrecht v. Herald Co.,* 452 F.2d 124, 129 (8th Cir.1971). To award both future profits and the value of the business at the time of the violation would constitute a double recovery. *Id.* at 131, II Areeda & Turner, *supra* at 234.

As we have construed it, the liability verdict in this case entitled the Raiders only to the stream of profits that could be earned in Los Angeles beginning in 1980; it did not entitle them

to the *value* of the Los Angeles expansion opportunity (the "value of the business") that had been legitimately possessed by the NFL. The monetary damage award gave them their profits from 1980-82, and the injunction covered their profits from 1982 forward. However, the injunction also gave them the "value of the business"—the excess value of the Los Angeles opportunity for which the NFL could have legitimately charged them. Thus, the combination of the injunction and monetary damages provided the Raiders with *both* the "lost profits" and the "value of the business" measures of relief.

Pending this appeal, then, the Raiders have been awarded double the compensatory relief to which they are entitled. In order to treble only a single measure of compensatory relief, this double recovery must be corrected before trebling; to do otherwise would in effect treble an incorrect measure of relief. Given the injunction that has already been awarded, the proper measure of compensatory relief in this case consists of the value of that injunction, plus whatever monetary damages are necessary to compensate the Raiders for the antitrust injury which is not redressed by the injunctive relief. To reach this monetary figure, the compensatory relief already received (i.e., the injunction, which includes the amount to be offset) must be deducted, *before* trebling, from the total compensatory recovery to which the Raiders are entitled. The resulting monetary amount combined with the injunction will fully compensate the Raiders for their injury, representing a *single* correct measure of compensatory relief. It is the monetary component of this overall recovery which should then be trebled.[8]

[8] Judge Nelson asserts that our calculation of damages improperly omits the 'residual" value of the difference in worth between the Los Angeles and Oakland opportunities (the "b" value from *Hanover Shoe*). To the extent that our decision is based on the hypothetical "outlay" of the Raiders to obtain the benefits of moving to Los Angeles (*see* footnote 7), there is simply no "residual" value present in this case which is analogous to the "b" value in *Hanover Shoes.*

In *Hanover Shoe,* it was appropriate to reduce "a", the expenditures the plaintiff was able to avoid because of defendant's insistance on leasing the shoe machinery, by the portion of "a" which remained in plaintiff's hands at the conclusion of the damage period (*i.e.*, "b", the residual value of the machines).

In sum, either of two scenarios are possible. If Rule 4.3 was illegal by itself, over the years, then the Raiders, as a party to that restraint, would have their damage award offset under a direct application of the *Perma-Life* rule. If Rule 4.3 was not illegal over the years, then the Raiders were not party to an illegal restraint through 1980; however, in that case, neither would the NFL's conduct through 1980 have been illegal. Because we have determined that Rule 4.3 was found to be invalid only as it was applied to the Raiders' proposed move in 1980, the NFL's pre-1980 conduct is not something for which a recovery may be had under the antitrust laws. Under these circumstances, a portion of the Raiders' injunctive relief included the value of the NFL's Los Angeles opportunity that had legitimately accrued to the NFL through 1980, a recovery which did not "flow . . . from that which [made] defendants' acts unlawful." *Brunswick* at 489, 97 S.Ct. at 697. The Raiders' additional monetary damages must be offset to the extent the injunctive relief went beyond the scope of the adjudicated antitrust violation.

This was because "a" by itself did not accurately reflect the plaintiff's actual outlay to purchase equipment; plaintiff's *net* outlay was the initial purchase price less the value of the machinery remaining in plaintiff's hands at the conclusion of the damage period. We can see no similar residual value remaining in the Raiders' hands as of 1982. The "residual value" identified by Judge Nelson, the difference between the 1982 values of the Los Angeles and Oakland opportunities, does not represent any value retained by the Raiders from their hypothetical outlay to acquire the Los Angeles opportunity. There is thus no reason to subtract that value from "a" to arrive a the Raiders' net outlay. To the extent that the 1982 value of the Los Angeles opportunity is relevant at all, it pertains to the question of the increase in value of that opportunity from 1980-82. That issue is dealt with in the following paragraph.

Judge Nelson also suggests that our analysis fails to take into account the extent to which the value of the Los Angeles opportunity increased from 1980 to 1982, relative to the value of the Oakland opportunity. On the contrary, this value is encompassed in the injunction awarded by the district court, which provided the Raiders with the *full* value of the Los Angeles opportunity as of 1982. Note that the increase in value of that opportunity from 1980 to 1982 is awarded by way of the jury's calculations of lost profits for those years.

CONCLUSION

We reverse the district court's denial of the NFL's motion for judgment n.o.v. on the Raiders' good faith and fair dealing claim, and remand so that the damages award on that claim can be vacated. As for the Raiders' and Coliseum's antitrust awards, we affirm the trebled damage verdict in favor of the Coliseum, but vacate the Raiders' antitrust damage recovery, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART and REMANDED.

NELSON, Circuit Judge, dissenting from Part IV:

I respectfully dissent from Part IV of this opinion.

I believe that the majority misconstrues *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), when it offsets, before trebling, the 1980 value of the Los Angeles opportunity less the 1980 value of the Oakland opportunity.[1] In so doing, it improperly collapses the two separate and distinct tasks of this court: (1) assessing the damages suffered by the Raiders as a result of the NFL's antitrust violation; and (2) compensating the NFL for the benefit conferred upon the Raiders by the district court's injunction. In Section IA of this dissent, I show precisely where the majority errs, and how we should properly assess antitrust damages. In Section IB, I emphasize my agreement with the majority's conclusion that *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), does

[1] The majority's assessment of damages rests upon an assumption, neither pleaded nor proved by the NFL, that the League actually would have charged the Raiders the difference between the 1980 values of the Los Angeles and Oakland opportunities. I base much of my dissent on the same assumption, but note that I would require the NFL to plead and prove that fact on remand.

In this connection, I am puzzled by the majority's contention that its so-called "primary" holding does not assume that the NFL would have charged the Raiders for the move. *See ante* at n. 7. If the NFL would not have charged the Raiders for the move, I see no way that the relief awarded could have been considered beyond the scope of the adjudicated antitrust liability.

not apply to this case. In Section II, I set forth what I believe is the correct method for compensating the NFL.

I. The Raiders' Antitrust Damages

A. The Majority Misapplies *Hanover Shoe* by Omitting a Crucial Element of the Damages Formula Upheld by the Supreme Court

In purporting to apply *Hanover Shoe* to the calculation of the Raiders' damages, the majority concludes that it is necessary and sufficient to treble the difference between the Raiders' lost profits between 1980 and 1982 on the one hand, and the 1980 value of the Los Angeles opportunity minus the 1980 value of the Oakland opportunity on the other. I disagree. It is my view that damages resulting from the unlawful restraint include all lost financial advantages, including profits and the accrued value of the business.

In *Hanover Shoe,* United's insistence upon renting rather than selling its machines was deemed a violation of the antitrust laws. Absent the violation, Hanover would have incurred no rental costs, but would have expended money in purchasing and servicing its own machines. Yet, in calculating pre-trebled damages, the district court did not simply deduct from Hanover's rental costs the purchase price and maintenance costs of the machines. Instead, it deducted the *difference* between the purchase price and maintenance costs on the one hand, and the residual value of the machines at the end of the damage period on the other. 245 F.Supp. 258, 287 (M.D.Pa.1965). That is, in order to arrive at a proper assessment of damages, the court deducted from Hanover's rental costs the *net* outlay the company would have had to make in securing the financial advantages of purchased machines. The district court's pre-trebled assessment of damages may be reflected algebraically, by the formula $D = R - (a - b)$, where;

"D" = pre-trebled damages;

"R" = total rents and royalties paid by Hanover during the complaint period;

"a" = the purchase price to Hanover of the machines it would have bought in 1939 (the beginning of the complaint period) or in any subsequent year when additional machines or replacement machines would have been acquired, plus the expenses Hanover would have incurred in servicing those machines;[2] and

"b" = the residual value of (1) machines deemed to have been disposed of at the end of an assumed life expectancy, and (2) machines on hand in September, 1955 (the date of the commencement of the action).

245 F.Supp. at 287-89. The Supreme Court affirmed this assessment. 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).

The majority opinion on damages *ignores* component "b". If, as the majority effectively concludes, "a" is the 1980 difference in worth between the Los Angeles and Oakland opportunities, then "b" must be the 1982 (*i.e.*, "residual") value of the difference in worth between the opportunities. Applying the *Hanover Shoe* rationale here, in order to reflect accurately the net outlay that the Raiders would have had to make in securing the financial advantages of the move to Los Angeles, we should deduct from lost profits not "a", but the *difference* between "a" and "b". That is, rather than trebling [R − a] as the majority does, we should treble [R − (a − b)] where:

"R" = lost financial advantages between 1980 and 1982;

"a" = the 1980 value of the Los Angeles opportunity minus the 1980 value of the Oakland opportunity; and

"b" = the 1982 value of the Los Angeles opportunity minus the 1982 value of the Oakland opportunity.

[2] For the sake of clarity, I have taken what the district court in *Hanover Shoe* called "S", and incorporated it into "a".

In failing to account for the 1982 (*i.e.*, "residual") value of the difference in worth between the Los Angeles and Oakland opportunities,[3] the majority underestimates the Raiders' damages.[4]

Beyond its failure to calculate properly the net outlay the Raiders would have been required to make in moving to Los Angeles in 1980 and operating there through 1982, the majority also fails to calculate properly the financial advantages the Raiders lost by virtue of not being able to move in 1980.[5] The antitrust laws provide for the trebled recovery of *all* financial advantages the plaintiff would have gained absent the unlawful activities of the defendant. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir.), *cert, denied,* 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). Consistent with that principle, the Raiders' pre-trebled recovery should reflect not only the lost profits from 1980 to 1982, but also the extent to which the increase in value of the

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[3] In its footnote 8, the majority offers no support for the contention that the difference in worth between the Los Angeles and Oakland opportunities has no "residual" value in 1982. Indeed, by deducting the 1980 value of the Oakland opportunity from the 1980 value of the Los Angeles opportunity before offsetting, the majority implicitly acknowledges that the Oakland opportunity had a "residual" value in 1980. Following the majority's reasoning, I find it inexplicable that the Los Angeles opportunity would not similarly possess a "residual" value in 1982.

In the majority's own words:

> Unquestionably, when the Raiders moved to Los Angeles, they appropriated for themselves the expansion value that had accumulated in Los Angeles. Although by moving out of Oakland the Raiders "gave back" an expansion opportunity [*i.e.*, a residual value] to the NFL, the uncontradicted testimony at trial showed the Los Angeles market to be a significantly more lucrative franchise opportunity.

Ante at 1371. In short, the majority's footnote 8 is inconsistent with its own offset calculation in the body of the opinion.

[4] That is to say, the majority overestimates the net outlay (a — b) the Raiders would have had to make in securing the financial advantages of the Los Angeles opportunity from 1980 to 1982.

[5] Here, I am refering to all lost financial advantages other than the increase in the value of the opportunities as reflected in the calculation of "a" and "b".

business during the same period would have been greater in Los Angeles than it actually was in Oakland.[6]

In *Fishman v. Estate of Wirtz*, 594 F.Supp. 853 (N.D.Ill.1984), a case strikingly similar to our own, the plaintiff was unlawfully precluded from purchasing a sports franchise. The district court included in pre-trebled damages both lost profits *and* the increase in the value of the business during the period of the violation.[7] Similarly, in *Magnus Petroleum Co. v. Skelly Oil Co.*, 446 F.Supp. 874 (E.D.Wis.1978), *rev'd on other grounds*, 599 F.2d 196 (7th Cir.), *cert. denied*, 444 U.S. 916, 100 S.Ct. 231, 62 L.Ed.2d 191 (1979), the district court allowed a corporation which had been unlawfully prevented from acquiring a business to recover three times the sum of both lost profits from the date of the attempted acquisition until the date of trial, *and* the increase in the value of the business' good will during that same period. 446 F.Supp. at 882-83. *See also Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 561, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931) (antitrust plaintiff's damages include both (1) the difference between the profits actually realized by the injured party and the profits it would have realized but for the unlawful acts complained of; *and* (2) the diminished value of its business as a result of such acts); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 958-59 (10th Cir.1959) (same), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960); *Photovest Corp. v. Fotomat Corp.*, 1977-1 Trade Cases (CCH) ¶ 61,529 (S.D.Ind.) (assessing pre-trebled damages of profits lost during antitrust violation *plus* difference between what business would have been worth absent a violation

[6] Contrary to the majority's assertion in footnote 8 of its opinion, it is not at all apparent that the jury's award included both elements of damages.

[7] In arriving at its assessment of pre-trebled damages, the court actually calculated the net value of the business as of the time of trial, added the monies distributed to the conspirator's stockholders during the violation period, and then subtracted the monies expended by its stockholders during that time. 594 F.Supp. at 861. Because the difference between monies expended and distributed accounts for both the price the plaintiff would have paid for the franchise when it was sold to the conspirator, and its net profit or loss during the violation period, the court's calculation of damages was exactly as I propose here.

and what it was actually worth at end of damage period), *aff'd in relevant part*, 606 F.2d 704 (7th Cir.1979), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed.2d 601 (1980); *Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 61 (S.D.N.Y.1964) (antitrust plaintiff entitled to recover lost profits *and* lost value of investment), *appeal denied*, 337 F.2d 844 (2d Cir.1964).

Perhaps the point is best illustrated by supposing that the Raiders had moved to Los Angeles in 1980, and then realized the appreciation in value of their business by selling the franchise in 1982. The financial gain attributable solely to the move would be: (1) the difference between the profits they made in Los Angeles from 1980 to 1982 and those they would have made in Oakland during the same period; and (2) the extent to which the increase in value of the business from 1980 to 1982 was greater than what the increase in value of the business would have been had they remained in Oakland. The majority ignores the second of the two financial advantages the Raiders would have secured by moving to Los Angeles in 1980 and operating there through 1982.

B. *Perma-Life* Does Not Apply To This Case

I agree with the majority that *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), simply does not apply to this case. The majority correctly concludes that the jury found Rule 4.3 illegal only as applied to the Raiders' move. *See ante* at 1369. Consequently, the Raiders were *not* a party to the restraint, and the fault-based offset theory of *Perma-Life* is inapplicable.[8]

[8] Even were we to find Rule 4.3 illegal per se, I question the majority's dicta that *Perma-Life* supports offsetting the value of a remedy before trebling. The majority's view seems to be a significant extension, unsupported by any authority of which I am aware, of the offhandedly expressed *Perma-Life* principle. Indeed, *Perma-Life* is most often cited in support of vigorous private enforcement of the antitrust laws. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745, 97 S.Ct. 2061, 2074, 52 L.Ed.2d 707 (1977). The Supreme Court has stated unequivocally that an antitrust plaintiff may recover only for "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent *and that flows from that which makes defendants' acts unlawful.*" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489,

II. Compensation Due the NFL

I also agree that the value of the Los Angeles opportunity, improperly conferred upon the Raiders by the district court's injunction, should be returned to the NFL. However, I do not agree that this value should be offset from pre-trebled actual antitrust damages. By offsetting before trebling in order to compensate the NFL for the lost value of the injunction, the majority effectively requires the Raiders to pay the League three times the value of an opportunity that was only *once* received. It is my view that the overbroad equitable relief the majority attacks is adequately and *properly* addressed by deducting the value of the injunction *after* trebling.[9]

This case presents a unique situation. Pursuant to its equitable powers, the district court issued an injuction against the antitrust violator. That injunction prohibited the NFL's ongoing, illegal restraint of the Oakland Raiders' move into Los Angeles. After

97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis added). In other words, only detriments and benefits *which flow from the antitrust violation itself* should enter into the calculation of antitrust damages. Since it appears that any "benefits" derived by the Raiders flowed directly from the remedy, and not from the NFL's antitrust scheme, it seems inappropriate to apply a *Perma-Life* offset before trebling the damages.

[9] One can appreciate the fairness of offsetting after trebling in the present case by examining the implications of a slight variation of the facts. What if the Raiders had not sought injunctive relief? In that case, there would be no question of offsetting the value of an equitable remedy. First, the Raiders would receive three times their actual antitrust damages (*i.e.*, three times the lost financial advantages between 1980 and 1982). Only afterwards would the court prevent the ongoing antitrust violation by prohibiting the restraint of the move, but premitting the NFL to charge the Raiders for the value of the move. In a sense, the mistake the majority commits can be characterized as one of blurring together the distinct benefits conferred by the injunction. First, the injunction prevented an *ongoing* anti-trust violation. Second, it effectively conferred upon the Raiders the *value* of the 1982 difference in worth between the Los Angeles and Oakland opportunities, for which the Raiders might have otherwise been charged. The remedy in this case should have been the trebled value of the lost financial advantages plus the right to *purchase* the opportunity to play football in Los Angeles. The amount to which the NFL was entitled incident to the move, improperly conferred upon the Raiders, can be *returned;* but to return this amount, the Raiders need only return it *once, after* trebling. Offsetting before trebling would result in a *treble* return for an improper remedy that was only *once* received.

liability attached, and the move had been made, this court raised *sua sponte* the issue of whether to deduct the value of the district court's injunction (the value of the opportunity to play football in Los Angeles less the value of the opportunity to play football in Oakland) from the pre-trebled antitrust damages. In addressing this issue of first impression, the majority has failed to seek guidance from cases involving related policy concerns.

In all of the cases discussed below, the governing principle is that the court should *separately* assess all offsets which are not related to the pre-trebled damage calculation. That is, offsets which do not flow from the violation itself should be deducted *after* trebling.[10]

A. The Policy Concerns That Motivated Both the *Flintkote* Decision and the Numerous Antitrust Settlement Cases Which Followed It, Apply to this Case

It is by now well-established that if an antitrust plantiff settles with one defendant, the amount of the settlement is to be set off *after* damages against the remaining defendants have been trebled, and *not before*.[11] The Ninth Circuit established this rule in *Flintkote Co v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). Other courts have adopted it as well. *See, e.g., Burlington Industries v. Milliken & Co.*, 690 F.2d 380, 393 (4th Cir.1983), *cert. denied*, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983); *Hydrolevel Corp. v. ASME*, 635 F.2d 118, 130 (2d Cir.1980), *aff'd on other grounds*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 534 (3d Cir.), *cert. denied sub nom. Wilson Freight Forwarding Co. v. Baughman*, 429 U.S. 825, 97 S.Ct. 78, 50 L.Ed.2d 87 (1976); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D.Ga.1973); *Vandervelde v. Put & Call Brokers & Dealers*

[10] In *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir.1971), *cert. denied*, 405 U.S. 955, 92 S Ct. 1173, 31 L.Ed.2d 232 (1972), the offset flowed from the violation.

[11] Obviously, this rule applies only when *all* of the defendants are jointly and severally liable for the antitrust damages.

Ass'n., 344 F.Supp. 157, 162 (S.D.N.Y. 1972); *Semke v. Enid Automobile Dealers Ass'n.*, 320 F.Supp. 445, 446-67 (W.D.Okla. 1970), *rev'd on other grounds but specifically approved on this point*, 456 F.2d 1361, 1371 (10th Cir. 1972).

In *Flintkote*, the Ninth Circuit provided three persuasive reasons for deducting settlement proceeds after trebling damages. 246 F.2d at 397-98. First, the antitrust laws provide that the plaintiff should receive three times the actual antitrust damages. If a court deducts settlement proceeds before trebling, the plaintiff's total award would be less than what the law requires. Second, Congress designed the antitrust laws to encourage suits by private plaintiffs. Offsetting before trebling would diminish the statutory incentive through judicial construction. Third, offsetting before trebling would discourage plaintiffs from settling, for every dollar received in settlement would result in a three dollar reduction in the final judgment. *See also Burlington Industries*, 690 F.2d at 393; *Hydrolevel*, 635 F.2d at 130; Note, *Contribution and Antitrust Policy*, 78 Mich.L.Rev. 889, 906 n. 87 (1980). While the third concern does not apply to the question of when to offset the value of the district court's injunction, the first and second clearly do. Accordingly, we should heed the plain language of *Flintkote*:

> [A] niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction.

246 F.2d and 398.

Admittedly, in *Flintkote, Burlington Industries, Hydrolevel, Baughman, Wainwright, Vandervelde*, and *Semke*, the offsets represented settlements by defendants whereas, here, the offset

under consideration is the value of an injunction. Nonetheless, I find no support in authority or reason for the contention that this factual distinction is material. Thus, these cases reinforce my belief that we should offset *after* trebling.

B. Analogies to Either (1) the Sole Antitrust Case Involving Both a Counterclaim and an Offset Where Plaintiff Did Not Contribute to His Antitrust Injury, or (2) Cases Involving Violations of Orders Setting Rental Ceilings, Suggest the Same Result: Offset After Trebling

Of the antitrust cases involving offsets where the plaintiff did not participate in the antitrust scheme,[12] only one case deals with counterclaims rather than settlements. In *Jerard Associates v. Stanley Words,* 1966 Trade Cases (CCH) ¶71,820 (S.D.N.Y.), the court held that the rationale of *Flintkote* applied equally well to counterclaims and, thus, decided to offset after trebling. The court went on to say: "We see no reason in law or justice why we should emasculate the treble damage provision by artificially trebling defendant's counterclaim. . . ." One might equally well remark in the present context that there appears to be no reason in law or justice why this court should emasculate the treble damage provision by deducting the value of the injunction before trebling—*i.e.,* artifically trebling the value of the injuction. Indeed, in *Jerard,* the court specifically stated that "[t]he purpose of the treble damage provision requires that *any* set-off to an antitrust judgment be deducted after trebling because a narrow construction of § 4 would do violence to the congressional purpose of aiding the enforcement of the antitrust laws by providing an incentive for private antitrust actions. . . [citations omitted, emphasis added]."

Another analogy may be drawn to cases dealing with violations of orders setting rental ceilings under the Emergency Price Controls acts of World War II. Under those acts, courts awarded treble damages to the tenants of landlords who willfully violated

[12] In *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 995, 92 S. Ct. 1173, 31 L.Ed.2d 232 (1972), the plaintiff *did* participate in the antitrust scheme.

rental ceiling orders. The cases held that actual damages should be trebled first, and that only afterwards should the amount of any unpaid rent be deducted from the trebled figure. In other words, offsets which do not flow from the violation itself should occur only *after* damages have been trebled. *See, Waters v. Turner,* 76 F.Supp. 279 (E.D.Pa.1948); *Sampson v. Thomas,* 76 F.Supp. 691 (E.D.Mich.1948).

Together with *Flintkote* and *Jerard*, these cases demonstrate that where the law has a punitive objective in trebling compensatory damages, offsets from the judgment must be made *after* the actual damages are trebled in order to serve that objective properly. The antitrust law applicable to the present case, 15 U.S.C. § 15, provides that the plaintiff "shall recover threefold the damages by him sustained." This court should have followed the Ninth Circuit's decision in *Flintkote* by holding that the purpose of those words would best be carried out by offsetting the value of the injunction after the jury verdict had been trebled.

APPENDIX B

APPENDIX B
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 83-5907, 83-5908, 83-5909
D.C. No. CV 78-3523-HP
ORDER
Filed March 12, 1987

LOS ANGELES MEMORIAL COLISEUM COMMISSION, et al.,
Plaintiff/Appellee,

v.

NATIONAL FOOTBALL LEAGUE, et al.,
Defendants/Cross-Defendants/Appellants,

v.

OAKLAND RAIDERS, LTD.,
(now known as LOS ANGELES RAIDERS),
Cross/Claimant/Appellee.

Before:

ANDERSON and NELSON,
Circuit Judges,

and S. WILLIAMS,*
District Judge.

We are indebted to counsel for calling to our attention our oversight concerning the still pending National Football League (NFL) petition for rehearing and suggestion for rehearing en banc filed June 30, 1986. We have received no response from any other parties concerning this oversight and we assume none is

* The Honorable Spencer M. Williams, United States District Judge, Northern District of California, sitting by designation.

intended. In order to bring this matter to a conclusion in this court:

IT IS ORDERED that the panel has voted unanimously to deny the NFL petition for rehearing and to reject the en banc suggestion.

The full court has been advised of the suggestion for en banc rehearing, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. The mandate shall issue forthwith.

The Raiders' motion for attorneys' fees on appeal in these and related cases is GRANTED. The assessment of attorneys' fees is REMANDED to the district court with instructions to permit a reasonable time for the NFL to respond to the fee application and for such further proceedings as may be appropriate to the determination.

Any appeal from a final determination shall be referred to this panel.

APPENDIX C

APPENDIX C

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

Case Number CV-78-3523-HP
Judgment on the Verdict
(For Plaintiff)

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff

v.

NATIONAL FOOTBALL LEAGUE, et al.,
Defendant

This cause having been tried by the Court and a Jury, before the Honorable HARRY PREGERSON, Judge presiding, and the issues having been duly tried and the Jury having duly rendered it's verdict; now, therefore, pursuant to the verdict, on the Anti-trust Claim,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) LOS ANGELES MEMORIAL COLISEUM COMMISSION, have and recover of and from the defendant(s) NATIONAL FOOTBALL LEAGUE, et al. the sum of Four Million, Eight Hundred Sixty Thousand and Eighty One Dollars ($4,860,081), which in accordance with § 4 of the Clayton Act, 15 USC § 15 is trebled to, Fourteen Million, Five Hundred Eighty Thousand, Two Hundred Forty Three Dollars. ($14,580,243). Attorney fees and costs to be set at some future date.

LEONARD BROSNAN, Acting Clerk
UNITED STATES DISTRICT COURT

Dated: April 13, 1983 By R. W. Johnson
Deputy Clerk

JUDGMENT ON THE VERDICT
(For Plaintiff)

CIV-49 (1/78)

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

Case Number CV-78-3523-HP
Judgment on the Verdict
(For Cross Claimant)

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff

v.

NATIONAL FOOTBALL LEAGUE, et al.,
Defendant

This cause having been tried by the Court and a Jury, before the Honorable HARRY PREGERSON, Judge presiding, and the issues having been duly tried and the Jury having duly rendered it's verdict; now, therefore, pursuant to the verdict, on the Anti-trust Claim,

IT IS ORDERED, ADJUDGED AND DECREED that the CROSS CLAIMANT (OAKLAND) LOS ANGELES RAIDERS, have and recover of and from the defendant(s) NATIONAL FOOTBALL LEAGUE, et al. the sum of Eleven Million, Five Hundred Fifty Four Thousand, Three Hundred and Eighty Two Dollars ($11,554,382), which in accordance with section § 4 of the Clayton Act, 15 USC § 15, is trebled to Thirty Four Million, Six Hundred Sixty Three Thousand, One Hundred Forty Six Dollars. ($34,663,146). Attorney fees and costs to be set at some future date.

LEONARD BROSNAN, Acting Clerk
UNITED STATES DISTRICT COURT

Dated: April 13, 1983 By R. W. Johnson
Deputy Clerk

JUDGMENT ON THE VERDICT
(For Plaintiff)

CIV-49 (1/78)

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

Case Number CV-78-3523-HP
Judgment on the Verdict
(For Cross Claimant)

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff

v.

NATIONAL FOOTBALL LEAGUE, et al.,
Defendant

This cause having been tried by the Court and a Jury, before the Honorable HARRY PREGERSON, Judge presiding, and the issues having been duly tried and the Jury having duly rendered it's verdict; now, therefore, pursuant to a stipulation, on the Good Faith and Fair Dealing claim,

IT IS ORDERED, ADJUDGED AND DECREED that the CROSS CLAIMANT (OAKLAND) LOS ANGELES RAIDERS, have and recover of and from the defendant(s) NATIONAL FOOTBALL LEAGUE, et al., the sum of Eleven Million, Five Hundred Fifty Four Thousand, Three Hundred Eighty Two Dollars ($11,554,382). Attorneys fees if any and Costs to be set at some future date.

LEONARD BROSNAN, Acting Clerk
UNITED STATES DISTRICT COURT

Dated: April 13, 1983 By R. W. Johnson
Deputy Clerk

JUDGMENT ON THE VERDICT
(For Plaintiff)

CIV-49 (1/78)

APPENDIX D

APPENDIX D

United States Court of Appeals

NINTH CIRCUIT

Nos. 82-5572 to 82-5574, 82-5664, 82-5665, 83-5714, 83-5732 and 83-5938
Argued and Submitted April 7, 1983
Decided Feb. 28, 1984

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants/Cross-Defendants-Appellants/Cross-Appellees.

Before:

ANDERSON and NELSON,
Circuit Judges,

and WILLIAMS,
*District Judge.**

Appeals from the United States District Court for the Central District of California.

J. BLAINE ANDERSON, *Circuit Judge:*

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

I. FACTS

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1 as

> the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . .

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and brought this action in September of 1978. The district court concluded, however, that no present justiciable controversy existed because no NFL team had committed to moving to Los Angeles. 468 F.Supp. 154 (C.D.Cal. 1979).

The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the rule to

require only three-quarters approval by the members of the League for a move into another team's home territory.[1]

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980, the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, 484 F.Supp. 1274 (1980), but this court reversed, finding that an adequate probability of irreparable injury had not been shown. 634 F.2d 1197 (1980).

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raiders' relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the Raiders in its effort to keep the team in its original home. The

[1] Rule 4.3 originally read:

> Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

> The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the first trial, 519 F.Supp. 581, 585 (1981), the court concluded the League was not a "single entity." Vol. 12 Clerk's Record # 931.

The district court denied the NFL's motions for change of venue, but did employ a detailed voir dire of the jury pool and of the jurors eventually empaneled. The trial was bifurcated so the jury could first determine liability. In the liability portion, counsel were limited to 40 hours of trial time per side in an effort to narrow the matters presented.

The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. The jury was instructed on the antitrust liability issues and sent out May 6, 1982. On May 7, 1982, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing. The court then continued the case to September 20, 1982, to begin the damages trial.

On June 14, 1982, the court issued its judgment on the liability issues, permanently enjoining the NFL and its member clubs from interfering with the transfer of the Oakland Raiders' NFL franchise from the Oakland Coliseum to the Los Angeles Memorial Coliseum. The court determined, in addition, that there was "no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and . . . expressly direct[ed] this final judgment be entered." Vol. 16 Clerk's Record # 2090. The NFL and its original clubs immediately appealed the permanent injunction (No. 82-5572); the original clubs of the American Football League also appealed (No. 82-5573), as did the Los Angeles Rams Football Co. (No. 82-5574) and the Oakland-Alameda County Coliseum (No. 82-5664). The Oakland Raiders cross-appealed challenging six orders entered by the court in 1981 and 1982 (Nos. 82-5665 and 83-5398). The NFL and Oakland Coliseum have also appealed the failure of the district court to grant their post-trial motions. (Nos. 83-5714 and 83-5732).

The damages trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.55 million and the Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. § 15. The NFL and the other defendants have appealed. (Nos. 83-5907, 83-5908 and 83-5909). This panel will hear and decide the damage appeals. But, because these appeals were expedited, the damage appeals will be decided in a later opinion after briefing, possible argument, and submission.[2]

[2] Once in this court, the parties have continued their practice of affirmative lawyering and have filed multiple motions. The motions that have not been resolved up until this point are here discussed.

First, the NFL has moved this court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning relevant market. We grant the motion and will discuss the effect of the stipulation with the merits section, *infra*.

Second, the Raiders agreed to drop its cross-appeal if the judgment of antitrust liability and injunction is affirmed. As we are affirming that judgment, we dismiss the Raiders' cross-appeals, Nos. 82-5665 and 83-5938. It is unnecessary to address the NFL's and Oakland Coliseum's motions on this subject.

II. SHERMAN ACT § 1

The jury found that Rule 4.3 violates § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, *see United States* v. *Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898), most restraints are analyzed under the so-called "rule of reason." *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48, 58 (1982).

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. 221 U.S. at 64-65, 31 S.Ct. at 517. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine whether that restraint promotes or restrains competition. *See Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683, 687 (1918).

Finally, the Raiders have moved to dismiss the NFL's and Oakland Coliseum's appeals from the district court's denial of their Fed.R.Civ.P. 60(b) motions. This motion is granted. The district court lacked jurisdiction to consider this motion; its denial of the motion is not an appealable order. *Smith* v. *Lujan*, 588 F.2d 1304, 1307 (9th Cir.1979). Also, the district court indicated no desire to entertain the motions if this court remanded this case back to it. *Id.* The appeals in Nos. 83-5714 and 83-5732 are dismissed.

In the present case, the district judge found that the unique nature of the business of professional football made application of a per se rule inappropriate. 468 F.Supp. 154, 164-168 (1979). The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that Rule 4.3 is not an unreasonable restraint of trade under section 1.

A. *Single Entity*

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs on this issue and as a preliminary matter the NFL states the jury should have been allowed to decide the question. A directed verdict may be granted pursuant to Fed.R.Civ.P. 50(a) when, viewing the evidence in a light most favorable to the nonmoving party, the testimony and all the inferences that the jury could justifiably draw therefrom are insufficient to support any other finding. *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963). When there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict, even in an antitrust case. *Cleary* v. *Nat'l Distillers and Chemical Corp.*, 505 F.2d 695, 696 (9th Cir.1974). Our review is *de novo*. *Santa Clara Valley*

Distributing Co. v. *Pabst Brewing Co.*, 556 F.2d 942, 944 (9th Cir. 1977).

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of § 1 is a fact question. *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2905, 73 L.Ed.2d 1314 (1982). It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. *Id.* Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extension of this argument was to make the League incapable of violating Sherman Act § 1 in every other subject restriction—yet courts have held the League violated § 1 in other areas. 519 F.Supp. at 583. Secondly, other organizations have been found to violate § 1 though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." 519 F.Supp. at 584. We agree with this reasoning.

NFL rules have been found to violate § 1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the

cross-ownership rule violated § 1. Other courts have held the League rules governing player contracts violate § 1 of the Sherman Act. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir. 1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from § 1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

670 F.2d at 1257.

Cases applying the single entity or joint venture theory in other business areas also contradict the NFL's argument. As stated by the Supreme Court:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." Perhaps every agreement and combination in restraint of trade could be so labeled.

Timken Roller Bearing Co. v. *United States,* 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199, 1206 (1951). *Timken* involved an allegation of territorial division among three companies that shared partial common ownership. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 141-142, 88 S.Ct. 1981, 1985-1986, 20 L.Ed.2d 982, 992 (1968), the Court reiterated that common ownership will not suffice to preclude the application of § 1. While these cases and others have been the subject of some criticism, *see, e.g.,* M. Handler and T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 Cardozo Law Review 23 (1981), they remain the law. In recognition that a broad application of *Timken* and *Perma Life* could subvert legitimate procompetitive business associations, this circuit has found the threshold requirement of concerted activity missing among "multiple corporations operated as a single entity" when "corporate policies are set by one individual or by a parent corporation." *General Business Systems* v. *North American Philips Corp.,* 699 F.2d 965, 980 (9th Cir.1983); *see Thomsen* v. *Western Electric Co.,* 680 F.2d 1263, 1266 (9th Cir.), *cert. denied,* 459 U.S. 991, 103 S.Ct. 348, 74 L.Ed.2d 387 (1982); *Las Vegas Sun, Inc.* v. *Summa Corp.,* 610 F.2d 614, 617 (9th Cir.1979), *cert. denied,* 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980). The facts make it clear the NFL does not fit within this exception. While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product"—the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act. In *Associated Press* v. *United States,* 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. *Id.* at 26, 65 S.Ct. at 1427, 89

L.Ed. at 2034 (Frankfurter, J., concurring). More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of per se illegality; instead, rule of reason analysis was the proper method to determine the legality of the arrangement. *Broadcast Music, Inc.* v. *Columbia Broadcast System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979);[3] *see also Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

The case of *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967), is closely on point. Sealy licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. 388 U.S. at 352-353, 87 S.Ct. at 1849-1850, 18 L.Ed.2d at 1242. Describing the Sealy organization as a joint venture, the Court nonetheless found it a per se violation of the Sherman Act. *See also United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515, 526 (1972) (Court finding a per se violation on facts similar to *Sealy*).

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respects an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling,

[3] On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven. *Columbia Broadcasting System, Inc.* v. *American Society of Composers*, 620 F.2d 930, 934-935 (2d Cir.1980), *cert. denied*, 450 U.S. 970, 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981). As will be discussed below, that reasoning squares with this circuit's view that a showing of anticompetitive effect is a threshold rule of reason consideration. *See Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir.1983).

resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution, which is to "promote and foster the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question. 388 U.S. at 353, 87 S.Ct. at 1850, 18 L.Ed.2d at 1242.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have an independent value." 519 F.Supp. at 584. The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an *NFL* member." 519 F.Supp. at 584. This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense.[4] Of course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude § 1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 at 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 at 648; *see* R. Bork, *The Rule of Reason and the Per Se Concept:*

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[4] One district court case has reached the opposite conclusion in a somewhat similar context. In *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal. 1974), the court upheld the NHL's right to preclude the Seals' proposed move to Vancouver. The court found both that the NHL is a single entity incapable of conspiring in violation of § 1 of the Sherman Act and that the denial of the move had no anticompetitive effect. A recent law review article argues that the court in *Seals* correctly decided the single entity issue. M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich.L.Rev. 1 (1983). Although *Seals* and this article offer persuasive reasons for recognizing the NFL as a single entity, we do not find these reasons so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the rule of reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws. *See Jefferson County Pharmaceuticals* v. *Abbott Laboratories*, ____ U.S. ____, ____-____, 103 S.Ct. 1011, 1016-17, 74 L.Ed.2d 882, 890-91 (1983); *see also United States* v. *Cooper Corp.*, 312 U.S. 600, 606, 85 L.Ed. 1071, 61 S.Ct. 742 (1941).

Price Fixing and Market Division, 74 Yale L.J. 775, 796-801 (1965).

B. *Rule of Reason*

In *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918), Justice Brandeis announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.' " *Cascade Cabinet,* 710 F.2d at 1373 (quoting *Northrop Corp* v. *McDonnell Douglas Corp.,* 705 F.2d 1030, 1050 (9th Cir.1983)). This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. *Cascade Cabinet,* 710 F.2d at 1373. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition." *Kaplan* v. *Burroughs Corp.,* 611

F.2d 286, 290 (9th Cir.1979), *cert. denied,* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.,* 699 F.2d 1292, 1296 (9th Cir.1983).

Our rejection of the NFL's single city entity defense implicitly recognized the existence of the first element—the 28 member clubs have entered an agreement in the form of the NFL Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," *Kaplan,* 611 F.2d at 291, proof that "is an absolutely essential element of a rule of reason case." *Id.; see Aydin Corp.* v. *Loral Corp.,* 718 F.2d 897, 901 (9th Cir.1983).

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. *E.g., North American Soccer League,* 670 F.2d 1249; *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173 (D.C.Cir. 1978); *Mackey* v. *National Football League,* 543 F.2d 606 (8th Cir.1976), *cert. dismissed,* 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent

agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. *See, e.g., Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). On the one hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal arrangement. On the other, and to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreements among competitors, i.e., cartels, to fix prices or divide market territories are presumed illegal under § 1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces. *See United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700, 705 (1927); *United States* v. *Topco Associates*, 405 U.S. at 611, 92 S.Ct. at 1135, 31 L.Ed.2d at 527-528.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the per se rule. *North American Soccer League*, 670 F.2d at 1258-1259; *see Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-1373 (9th Cir.1983). Instead, we must examine Rule 4.3 to determine whether it reasonably serves the legitimate

collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility, weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 61 (1982).

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. *See Kaplan*, 611 F.2d at 291; *see also Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 268-269 (7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). Such evidence is essential in a section 1 case. *See Continental TV, Inc.*, 433 U.S. at 53 n. 21, 97 S.Ct. at 2559 n. 21, 53 L.Ed.2d at 582, n. 21 ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

In the present case, the parties entered a stipulation regarding relevant market evidence because the time allowed for witnesses in the second trial was restricted by the trial court. The stipulation provided that no experts would be called to testify on the subject. Instead, the transcripts and exhibits used by the economic experts were deemed incorporated in the record and admitted in evidence at the retrial, allowing counsel to argue market issues as if the experts had testified before the jury. Our review shows, however, that neither the transcripts nor the exhibits were placed before the jury. We are surprised that in a trial of

this magnitude these able attorneys would neglect such important evidence. Upon a careful review of the record, however, we find that testimony of others was sufficient to cover the subject where necessary, and to guide the jury's finding that Rule 4.3 is an unreasonable restraint of trade.

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away rom each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Kaplan, 611 F.2d at 292 (quoting *SmithKline Corp.* v. *Eli Lilly & Co.,* 575 F.2d 1056, 1063 (3d Cir.), *cert. denied,* 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978)). Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. *Id.* at 291; see 3 J. von Kalinowski, *Antitrust Laws and Trade Regulations,* § 8.02[2] (1983). Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded. *Kaplan,* 611 F.2d at 292 (quoting *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)).

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). The NFL argues it competes with all forms of

entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the League. A similar conclusion can be drawn from the extraordinary number of television viewers—over 100 million people—that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2 billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such as New York City-New Jersey, Washington, D.C.-Baltimore, and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one another for the tenancy of NFL teams. Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams is presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the *potential* for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's market definitions. Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e.,

competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conslusion.

2. The History and Purpose of Rule 4.3

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another team's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however, the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous competition" can be a defense to a restraint of trade. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129, 1167 (1940). Conversely, anticompetitive purpose alone is not enough to condemn Rule 4.3. *See Chicago Board of Trade*, 246 U.S. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687. The rule must actually harm competition, and that harm

must be evaluated in light of the procompetitive benefits the rule might foster. *See Kaplan*, 611 F.2d at 291.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir.1898), *aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). R. Bork, *The Rule of Reason, supra* at 799-800. Most often discussed in the area of covenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Id.* at 797-798; *see Addyston Pipe*, 85 F. at 281-82; *Lektro-Vend*, 660 F.2d at 265.

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category." R. Bork, *Ancillary Restraints and the Sherman Act*, 15 Antitrust L.J. 211, 212 (1959). We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, *id.*, the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 901 (9th Cir.1983). As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. *See Smith* v. *Pro Football, Inc.*, 593 F.2d at 1185. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL argues, however, that territorial allocations are *inherent* in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel*, 85 F. at 282. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some

control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. *See* Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League*, 459 U.S. 1074, 1080, 103 S.Ct. 499, 502, 74 L.Ed.2d 639, 641 (1982); *Lektro-Vend*, 660 F.2d at 265. This is a pertinent factor in all rule of reason cases. *See Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1228-30 (9th Cir.1982); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). Here, the district court correctly instructed the jury to take into account the existence of less restrictive alternatives when determining the reasonableness of Rule 4.3's territorial restraint. 32 T.R.2d at 7218; *see Betaseed, Inc.*, 681 F.2d 1203 at 1228; *Berkey Photo*, 603 F.2d at 303. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no

standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. *See United States* v. *Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The present case is in fact a good example of how the market itself will deter unwise moves, since a team will not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten to transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no

loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of *interbrand* competition. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568, 581, n. 19 (1977). To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition. *See id.*, at 51-56, 97 S.Ct. at 2558-2560. Here, the jury could have found that the rules restricting team movement do not sufficiently promote interbrand competition to justify the negative impact on intrabrand competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws,* 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.; see Silver* v. *New York Stock Exchange* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under § 1); *cf. Deesen* v. *Professional Golfers Ass'n,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966) (where PGA had reasonable rules governing eligibility of players for tournaments, there was not a § 1 violation). In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

III. JURY INSTRUCTIONS

The NFL also claims it is entitled to a new trial because of error in the jury instructions. In particular, the NFL argues that the instructions lacked the specificity required in a complex lawsuit such as this, that certain of its legal theories should have been presented to the jury, and that the instructions failed to articulate all the requirements of the law for finding an unlawful restraint of trade. The L.A. Coliseum and the Raiders respond by stating that the instructions as given were entirely adequate and the NFL simply attempted to have the jury charged with a partisan and erroneous view of the law.

As required by Fed.R.Civ.P. 51, the NFL submitted proposed instructions and made timely objections when certain of its proposals were rejected. The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. *Ragsdell* v. *Southern Pacific Transportation Co.*, 688 F.2d 1281, 1282 (9th Cir.1982); *Van Cleef* v. *Aeroflex Corp.*, 657 F.2d 1094, 1099 (9th Cir.1981). A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented. *Id; Investment Service Co.* v. *Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir.1975). Well-tailored and specific instructions may be necessary, however, in complex antitrust cases "where . . . abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex." *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 466 n. 13 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Also, a party is entitled to have theories supported by the evidence presented to the jury. *Reno-West Coast Distribution Co., Inc.* v. *Mead Corp.*, 613 F.2d 722, 725-726 (9th Cir.), *cert. denied*, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 183 (1979). The theory, of course, must have legal as well as factual support; if what is proposed is incorrect the court is not required to recast it in order to ensure the party's exact theory is before the jury, so long as the instructions describe the applicable law. *See id.*

The NFL first contends the instructions failed to emphasize the unique nature of the business of producing NFL football, a business, it argues, most aptly characterized as a joint venture. The trial court's rule of reason instruction, however, told the jury it should consider the "nature of" and "facts peculiar to" the industry and that "one factor you may consider is the degree of mutual cooperation inherent among the member clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses." 32 T.R.2d at 7216-7218. While not framed in the terms and detail requested

by the NFL, this instruction did apprise the jury of the unique nature of NFL football. The trial court was not obliged to specifically instruct the jury on the NFL's theory that the restraint involved here is ancillary to a valid joint venture agreement. The Supreme Court has recognized that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637, 648 (1978). The NFL's theory is subsumed within the rule of reason. As the district court emphasized, the NFL had every opportunity to present its view of the legality of Rule 4.3 to the jury. 32 T.R.2d at 7195, 7223. The NFL did just that in its closing argument. *E.g.,* 33 T.R.2d at 7491-7495.

The NFL next argues the district court improperly rejected its instruction on causation. It is true the court did not instruct the jury on this element of proving when an injured party is entitled to treble damages under § 4 of the Clayton Act. *See Brunswick* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, 712 (1977); *see also Kapp* v. *National Football League,* 586 F.2d 644, 648 (9th Cir.1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). In this bifurcated trial, however, the jury and the court were not faced with the question of the propriety of an award of damages, but with the question whether Rule 4.3 violated the antitrust laws and therefore could not be used to preclude the Raiders' move south. *Pueblo Bowl-O-Mat,* 429 U.S. at 491, 97 S.Ct. at 698, 50 L.Ed.2d at 713. Whether the jury received proper instructions in this area is best left for the appeal of the damage portion of the trial.

The NFL also argues it was unduly prejudiced by the instructions because they focused on issues of competition among the NFL teams (intrabrand competition) rather than competition between the NFL "product" and other forms of entertainment

(interbrand competition). As the NFL asserts, it is the suppression of interbrand competition that primarily concerns the antitrust laws. The trial court instructed the jury on the NFL's relevant market claim that it competes with all forms of entertainment. 32 T.R.2d at 7212-7215. In light of this instruction, the jury was not constrained to ascertain the reasonableness of Rule 4.3 solely in view of the internal NFL market.

There also was no error in the failure of the district court to charge the jury that it could balance the loss of competition in the San Francisco Bay Area against that to be gained in the Los Angeles area. The extent of the loss and gain to competition in these locations was a fact question that could be argued to the jury.

The NFL next argues that the trial court should have charged the jury that it could consider the procompetitive significance of public service and similar benefits, if any, that inure to Rule 4.3. We again find no error. As stated in *National Society of Professional Engineers:*

> the purpose of [either per se or rule of reason] analysis is to form a judgment about the competitive significance of the resraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 692, 98 S.Ct. at 1365, 55 L.Ed.2d at 650. The judge instructed the jury that it should consider only procompetitive benefits of Rule 4.3. 32 T.R.2d at 7216. The NFL was permitted to argue that rule 4.3 has procompetitive effects related to serving the public. No more is necessary.

The NFL's other assignments of error in the instructions are without merit. In sum, we are not persuaded that any lack of specificity misled the jury.

IV. VENUE

Oakland Coliseum, intervenor joined by the NFL, argues that the trial court abused its discretion by denying a change of venue motion made pursuant to 28 U.S.C. § 1404(a). In relevant portion, § 1404(a) allows a district court to change venue "in the interest of justice." Oakland Coliseum claims justice would have been served by moving the case because it was impossible to secure an impartial jury in the Central District of California due to pretrial publicity and the economic interest of the prospective jurors in the outcome of the lawsuit. Prior to voir dire, the district court made a thoughtful and thorough analysis of Oakland's contentions in its memorandum and order denying the change of venue motion. 89 F.R.D. 497 (1981).

We will find an abuse of discretion warranting reversal only if Oakland Coliseum shows "that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice." *Murphy* v. *Florida,* 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589,597 (1975); *see Smith* v. *Phillips,* 455 U.S. 209, 215-217, 102 S.Ct. 940, 944-945, 71 L.Ed.2d 78, 85-86 (1982); *Chandler* v. *Florida,* 449 U.S. 560, 581-582, 101 S.Ct. 802, 813, 66 L.Ed.2d 740, 756 (1981); *United States* v. *Bailleaux,* 685 F.2d 1105, 1109 (9th Cir. 1982); *United States* v. *Brown,* 540 F.2d 364, 379 (8th Cir. 1976). Neither the pretrial publicity nor the alleged financial interest of the jurors compels such a finding.

We assume, with some basis, that the Raiders' proposed move and this lawsuit generated a large amount of publicity in the Los Angeles area. That in itself, however, is insufficient to compel a finding that the defendants were denied an impartial jury. *Dobbert* v. *Florida,* 432 U.S. 282, 302-303, 97 S.Ct. 2290, 3202-3203, 53 L.Ed.2d 344, 361-362 (1977); *Murphy* v. *Florida,* 421 U.S. at 800-802, 95 S.Ct. at 2036-2037, 44 L.Ed.2d at 595-596. Only in those situations which are "utterly corrupted by press coverage" will we indulge in a presumption of actual prejudice on the part of any or all of the jurors. *Murphy,* 421 U.S. at 798, 95

S.Ct. at 2035, 44 L.Ed.2d at 594. No such showing has been made out here. The trial court used a very thorough voir dire process to ensure the jury panel members were not influenced by the publicity prior to trial, including administering a 48-page questionnaire prepared by the NFL to all prospective jurors, giving each side ten peremptory challenges instead of the normal three, and dismissing jurors for cause if even the slightest doubt of prejudice was raised. During the trial, the court admonished the jurors each day to refrain from exposure to any type of media coverage of the trial. In fact, one juror was excused because he admitted reading an unscreened newspaper, even though he adamantly denied reading anything but the Ann Landers column, the comics and the "Family Weekly" section. 23 T.R.2d at 4705-4706, 4920. In view of the trial court's thorough cautionary actions, we cannot say either that he abused his discretion in denying a change of venue or that defendants received an unfair trial because of the publicity.

Failing to show anything beyond the slightest speculation that publicity infected the fairness of the trial, Oakland Coliseum turns to the argument that the jurors had a financial interest in the outcome of the lawsuit which biased their decision. This contention is premised on the economic interest through lower taxes and business generation that residents of the Central District of California purportedly would have in the Raiders' presence in the L.A. Coliseum. The argument also seeks support in Supreme Court precedent such as *Withrow* v. *Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), and *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), which stand for the proposition "that the probability of actual bias on the part of the judge or decisionmaker is too high . . . [when] the adjudicator has a pecuniary interest in the outcome." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464, 43 L.Ed.2d at 728. Those cases do not mean, however, that an immeasurable and seemingly insignificant economic benefit to a taxpayer suffices to disqualify her or him as a juror. *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568, 571 (E.D.Va.1975); *cf. United States* v. *Brown* 540 F.2d 364, 379 (8th Cir.1976) (there

was no basis to strike jurors for cause merely on showing they resided in St. Louis and indictment alleged a scheme to defraud the city and its citizens).

Here, in fact, four of the eight jurors resided outside Los Angeles County. All the jurors were questioned during voir dire on their potential for any financially motivated bias and the judge was satisfied with the jurors' responses to his questions. Apparently recognizing the defects in its arguments, Oakland also alleges that the questioning and arguments of plaintiffs' counsel at trial were sufficient to convince the jurors to lay aside their sworn duties and decide the case on the basis of "hometown" interests. We decline to engage in such speculation about the mental processes of the individual jurors.

The other arguments made by Oakland on this issue, such as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits. Nor do we believe the "cumulative" effect of the publicity, economic interests and the like show a sufficient likelihood of actual bias. Without more, we are compelled to affirm the denial of the change of venue motion and conclude that the defendants received a fair trial by an impartial jury.

V. CONCLUSION

The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," *Betaseed, Inc.* v. *U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir.1982), and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is

AFFIRMED.

SPENCER WILLIAMS, District Judge, Sitting by Designation, concurring in part, dissenting in part.

INTRODUCTION:

I respectfully dissent from the majority's opinion, insofar as it affirms the district judge's directed verdict that the N.F.L. was not a single entity as a matter of law.

The dispositive issue before this Court is whether the N.F.L.'s invocation of Rule 4.3 to block the Raiders' move to Los Angeles violates the letter and spirit of § 1 of the Sherman Act, 15 U.S.C. § 1. I conclude that the N.F.L. is, as a matter of law, a single entity insofar as this aspect of its operations is concerned, and not subject to the strictures of Sherman Act § 1.

These appeals arise from the controversial relocation of the Raiders National Football League franchise ("Raiders") from Oakland, California to Los Angeles, California. Although many subsidiary procedural issues are posed on appeal, the case stands or falls on whether the trial judge properly concluded that the N.F.L. was not a "single entity", thereby exposing it to liability for Rule 4.3 under the Sherman Act, § 1.

FACTS:

Our consideration of the issue whether or not Rule 4.3 of Article IV of the N.F.L. Constitution violates federal antitrust laws must turn on the relationship of Rule 4.3 to the structure of the league. For this reason, it is appropriate to briefly examine

the history and nature of the N.F.L. as a business association, before addressing the issues raised on this appeal.

A. The Relevant History of the N.F.L.

The N.F.L. was established early in this century as an unincorporated business association, the members of which were member franchise clubs dispersed throughout the United States. All but one of its members are privately owned and operated, and although members of the N.F.L. compete on the playing field, they act jointly in many aspects of their enterprise, as the term "league" implies.

The N.F.L.'s Constitution and By-Laws wield almost plenary control over member clubs' activities; the N.F.L. acts as the legislative entity which sets rules for, and schedules contests between member clubs, and regulates many other aspects of the operation of the professional football industry, (*e.g.*, an annual draft of eligible college athletes), including the territorial restriction on franchise relocation found in Rule 4.3.

Of particular importance to our analysis is the fact that the N.F.L. Constitution provides for coordination of business activities and revenue sharing to an overwhelming degree. For example, the money derived from lucrative national broadcasting contracts is shared among league members according to agreed upon formulae, and this revenue makes up a large part of the revenue of each team. As to gate receipts for regularly scheduled contests between member clubs, there is a prearranged equation splitting gate admissions between the "home" and "visiting" clubs. Thus, each team relies, to a significant degree, on revenue jointly generated.[1] It is not surprising that, concomitant with this virtual "partnership" arrangement, of which the above-mentioned revenue sharing is most significant, other operating decisions which would normally be made by the owners of a

[1] Indeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced.

single franchise are subordinated to specified consent of the other clubs. For example, establishment of a new franchise is submitted for approval to all N.F.L. owners before any expansion is permitted. Agreements among owners regarding who shall have the right to employ certain athletes occur every year at an annual "draft" of available players.

At issue here is one aspect of the relationship among the member clubs of the N.F.L. as to when a member franchise club may be relocated to a city other than its original home. It is quite relevant to disposition of this instant suit that those challenging the legality of Rule 4.3 are the Raiders, presently a member club, and the L.A. Coliseum, a stadium seeking an N.F.L. tenant.

B. The History of the Present Action.

I agree in large part with the majority's review of the facts leading up to the two trials below. However, I would emphasize the troubling effect that the stipulation on the presentation of evidence in the second trial had upon the sufficiency of the evidence on relevant markets that was actually placed before the jury.[2]

C. The Various Appeals Pending before this Court.

In addition to the appeal to which the majority and I turn our primary attention, several other motions are pending before this Court. It is these items, and the questions that these cross-appeals raise, that I now address.

Once in this Court, the parties have continued to file multiple, and somewhat conflicting, appeals. The motions that have not been resolved by the majority are largely different procedural means to accomplish the same ends; I discuss the more significant below.

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[2] See Majority Opinion at 1392-1394, and my discussion *infra* of the inconsistency left unanswered by the majority's treatment.

First, the N.F.L. has moved this Court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning the evidence introduced at the second trial on the relevant market. I find the majority's treatment of this matter interesting, inasmuch as it suggests that the issue of relevant market is no longer one for the jury; we admit to similar surprise that the very evidence that the parties thought at a minimum should have been placed before the jury was, in fact, never so placed in the second trial. Regardless of how the majority wishes to restate the manner in which relevant market is to be proven in this Circuit, its approach is to recharacterize the case as was tried, and suggest by inference that the plaintiff may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury; this lynchpin of its "rule of reasonableness" cannot pass as innocuously by long-standing precedent as the majority would have it. Since I feel that it was error to submit Rule 4.3 to the jury in this context, I would not so strain the case as was tried the second time around to conform it to some new, and as yet undefined, rule of law.

Second, the Raiders cross-appeal from the district judge's rulings: (1) determining, on summary judgment, that N.F.L. Rule 4.3 was effectively amended on October 5, 1978; (2) that, as a matter of law, no contract was created between the Raiders and the N.F.L., on October 5, 1978; and, (3) that a directed verdict on behalf of Rozelle, Frontiere and Klein was appropriate, would presumably be withdrawn, under the majority's disposition; I would affirm the trial court's handling of all three matters.

Finally, as for the N.F.L.'s motion for remand of the injunctive judgment entered on June 14, 1982, with instructions to the court for a new trial, I find the matters raised by the motion in the alternative to the N.F.L.'s notice of appeal, especially the allegations surrounding the plaintiffs' supression of a key document, the "Hardy notes," distressing. I note that the majority's opinion does not deal with this issue.

DISCUSSION:

The district court found there were no disputed issues of material fact on the question of whether the N.F.L. was a single entity under the Sherman Act § 1, insofar as its enforcement of Rule 4.3 was concerned, and directed a verdict for appellees concluding that it was not. Upon this finding, Rule 4.3 was submitted to the jury's scrutiny under the Rule of Reason analysis of the Sherman Act, § 1.

Under established Ninth Circuit law, resolution of whether the N.F.L. had the capacity to violate Section 1 of the Sherman Act by conspiring *inter se* must be committed to the jury, if there exists "sufficient evidence in the record to permit a jury to find" that the N.F.L. was not a single entity, but "not . . . sufficient (evidence) to preclude the jury from finding otherwise." *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.1982) (*per curiam*).

In *Murray* v. *Toyota Motor Distributors, Inc., supra,* the Ninth Circuit held that the "single entity" question must not be taken from the jury where the evidence would *permit* a finding that the defendants are part of a single economic unit. As the majority in this case states: "(i)t would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution". *Id.* I read the majority's opinion to find such an opportunity for "reasonable minds" to differ, even if the evidence that whether "the N.F.L. has attributes of a partnership or joint venture (wa)s *not* "compelling", since it should have been submitted to the jury once there was simple "persuasive" evidence on either side. *C.f., Majority Opinion* at 1387.

I agree however with the district court that there were no material issues of disputed fact as to whether the N.F.L. was a single entity, and that the matter was ripe for disposition as a matter of law by the court. I also apply the settled rule of appellate review, that such decisions by the trial court are subject to *de novo* review by this Court. *C.f., General Business Systems* v. *North American Phillips Corp.*, 699 F.2d 965, 980-81 (9th

Cir.1983). But, the majority and I differ substantially in the conclusions to be drawn from such undisputed evidence.

The only realistic manner in which to define what constitutes a single entity for antitrust review is to focus upon the purpose the definition is to serve. "Single entity" taken in a functional sense begins and ends with an analysis of formal organizational and operational aspects of an enterprise, reconciled with the realities of the economic competition in the marketplace. If the aim of the Sherman Act § 1 is consumer-dictated supply, unfettered by conspiracy between competing producers,—and, I submit that it is—extreme caution is warranted in defining precisely what competitive units exist in the marketplace. It is equally as important to permit collaboration and concerted action among branches of a single economic entity in the marketplace with impunity from the Sherman Act § 1, as it is to police conspiracies between economic competitive entities. Nonetheless, all economic units remain susceptible to challenge under the antitrust laws from those external entities injured by acts violative of § 1, or competitive entities injured as a result of monopoly, or attempted monopoly, in an industry under Sherman Act § 2 tenets.

Resolving whether the N.F.L. is a single entity requires consideration of many factors, including formalistic aspects of operations such as ownership, overlapping directorates, joint marketing or manufacturing, legal identity, corporate law autonomy, and substantive aspects such as *de facto* autonomy of member clubs, chains of command over policy decisions, public perception and economic interdependency rendering otherwise independent member clubs subordinate to the integrated whole. When the entities in question are to be evaluated under the antitrust laws, the crucial criterion is whether the formally distinct member clubs compete in any economically meaningful sense in the marketplace. See *General Business Systems, supra* at 980-81.

The majority's attempt to reconcile its decision with that of *General Business Systems, supra,* is misleading and inaccurate. The text of the majority's opinion implies that corporate policies *must* be unitary for a business organization to be found a single

entity. In *General Business Systems, supra,* at 980-81, the Circuit concluded that in any case in which the relationship between the two or more formal entities did "not fall clearly at either of these extremes"; *i.e.,* "where corporate policies are set by one individual or a parent corporation" or where "jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing organizations, and set policy independently . . ." (*id.* at 980), the case must be sent to the jury. This admonition was disregarded in this case—a paradigm case testing the functional "single entity" concept.

The district court placed an unwarranted emphasis upon the formalistic aspects of the relationship of the N.F.L. and the member clubs, ignoring the subtle, but yet more significant interdependency of the member clubs and the indivisibility of the clubs with the N.F.L. 519 F.Supp. 581, 582-83. For example, the district court makes much of two such formal organizational characteristics: separate incorporation and management. *Id.* But, when viewed from the mundane perspective of daily operations, emphasis upon these legal formalisms obscures the reality of life in the N.F.L. Only the athletic strategems are autonomous—albeit tightly constrained by league guidelines on eligibility, medical and physical condition and exploitation of player talent. The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit.

As the majority opinion correctly points out:

> this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman

> Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, . . ., the N.F.L. teams *are not true competitors nor can they be.*

Majority opinion, at 1391, *emphasis added.* Yet, the majority's analysis falters in a similar manner. It is the commonality of, or necessary cooperation in, the means of production, not the formal structure of the ownership of the N.F.L. infrastructure which should be determinative of the classification of this enterprise.

The profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor. The dispositive factor in determining whether the member clubs are capable of conspiring to restrain competition—the *sine qua non* of the Sherman Act § 1—by reason of Rule 4.3, is the extent, if any, of their competition in an economic sense. Virtually every court to consider this question has concluded that N.F.L. member clubs do *not* compete with each other in the economic sense. See *North American Soccer League* v. *N.F.L.*, 670 F.2d 1249, 1251 (2d Cir.1982); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C.Cir.1978); *Mackey* v. *N.F.L.*, 543 F.2d 606, 619 (8th Cir.1976); *Mid-South Grizzlies* v. *N.F.L.*, 550 F.Supp. 558, 562 (E.D.Pa.1982); *U.S.* v. *N.F.L.*, 116 F.Supp. 319, 323-324 (E.D.Pa.1953).

As the district court in *Mid-South Grizzlies* acknowledged, although

> (a)ll but one team are privately owned and operated . . . and 'compete' with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies.

Mid-South Grizzlies, supra at 562. In adopting this view to reject a potential entrant's challenge to his exclusion from N.F.L. participation, the court in *Mid-South Grizzlies* recognized that

the creation of many joint products, only the most tangible of which is the professional football season, as byproducts of the intangible "goodwill" are directly attributable to the present league/member club structure. *Id.* at 568. I agree with the other courts which, when presented with similar questions arising in professional hockey and basketball, realized that it is nonsensical to emphasize intrinsic worth of a franchise in a vacuum, when the value of the franchises are part and parcel of the quality and conformity insured by league regulation of the placement, ownership, and coordination of all on and off the field interaction of member clubs. See *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966, 969-971 (C.D.Cal.1974) (the N.H.L., although subject to full scope of the antitrust laws, is "one single business enterprise, competing against other similarly organized professional leagues"); *Levin* v. *National Basketball Association,* 385 F.Supp. 149, 150, 152 (S.D.N.Y.1974) ("While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case.").

The majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this issue. As the majority points out, but misapplies, the Second Circuit found the N.F.L. to be an "unincorporated joint venture". *N.A.S.L.* v. *N.F.L., supra* at 1257, (2d Cir.), *cert. denied,* ____ U.S. ____, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). The Fifth Circuit, in an obscure but quite scholarly opinion, analyzed the North American Soccer League to be like the N.F.L.; *i.e.,* a "joint employer" for labor relations purposes, upon an examination of its "N.F.L.-like" characteristics. *N.A.S.L.* v. *N.L.R.B.,* 613 F.2d 1379, 1382 (5th Cir.1980). The Third Circuit, after reviewing the substantial history of "single entity" litigation in the professional sports leagues, endorsed the D.C. Circuit's conclusion that the N.F.L. was a "single entity" for purposes of Sherman Act § 1, and thus not subject to "invocation of a *per se* rule" against "group boycotts", because: (1) "the N.F.L. clubs that had combined were *not* competitors in any *economic* sense" and "no team was 'interested in driving another team out of business'; and, (2) the

N.F.L. clubs had not combined '*to exclude competitors or potential competitors* from their level of the market.' *Larry V. Muko, Inc.* v. *Southwestern P.A., etc.*, 670 F.2d 421, 429, n. 11 (3d Cir.1982), citing *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C.Cir.1978). (*emphasis in original*). (Other citations omitted).

What these courts have all recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's "downstream output". In the case of the member clubs, this "downstream output" is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the N.F.L. There is virtually no practical distinction between the League, administered by the appointed Commissioner, *per se* and the member clubs; the N.F.L. represents to all clubs, including the Raiders, the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.

Although the N.F.L. determines matters of scheduling, resolving player disciplinary matters and inter-club disputes, supervising officials and public relations, as well as other routine matters, critical league decisions, such as the matter of franchise location, are submitted to an Executive Committee comprised of a representative of each club. There can be no instance of the Executive Committee acting in other than the collective interests of the member clubs, since by definition, that body's decisions are the consensus of N.F.L. members. There is no distinct interest of the N.F.L., since it exists solely to coordinate the members' participation in the joint production of professional football.

By riveting its attention upon the "single entity" issue, as a sort of talismanic affirmative defense to the appellees' charges here, the district court overlooked the dispositive inquiry of whether Rule 4.3, as an instrument of the N.F.L. member clubs, violated the Sherman Act § 1, by restricting any economically

independent entities from supplying goods or services related to professional football to the individual clubs. I use "upstream flow" as shorthand for products and services like players and coaches, television services, potential investors and the myriad of other integrated industries; member clubs do have independent and economically significant identities apart from the collective N.F.L. for the limited purposes of their extra-league dealings with those upstream suppliers. See Weistart & Lowell, *Law of Sports*, § 5.11 (1978), 687, 692 esp. n. 86. Thus, § 1 can and should protect the competitive aspects of player drafts, disallow cross-ownership bans and exclusive television and equipment contracts, by insuring that any one club's interaction outside the confines of intra-league regulation of production of the sport is unfettered by the working of any intraleague rule.

This is the critical distinction between cases which invalidate various intraleague rules, and those which uphold them. That member clubs compete for investors and the services of talented players is underscored by the fact that, although aggregate revenues are shared among all member clubs, there is no intra-league regulation upon the form of investment by a member club's financial backers, the dividend policy, or operating expenses and expenditures of any member for player services. League regulations comport with economic reality in this sense; courts have merely applied a similar philosophy to other aspects of the professional leagues' operations, including, *inter alia*, club-player relationships. *See, e.g., Smith, supra* (N.F.L. player draft held to violate § 1, even though N.F.L. teams not "economic" competitors, because it "forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."); *Mackey, supra*, (only relevant market in which to evaluate "Rozelle Rule" was that "for players' services"); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1061 (C.D.Cal.1971) (harm resulting from restriction on non-collegiate players' recruiting was these players' exclusion from market in which they sought to compete by reason of the monopoly power exerted by the N.B.A.); *accord, Linseman* v. *World Hockey Association,*

439 F.Supp. 1315, 1322 (D.Conn.1977); *Kapp* v. *National Football League,* 390 F.Supp. 73, 81-82 (N.D.Cal.1974), *appeal vacated,* 586 F.2d 644 (9th Cir.1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979) ("(a) conceivable effect of th(e "ransom" or "Rozelle" rule) would be to *perpetually* restrain a player from pursuing his occupation among the clubs of a league that holds a virtual monopoly of professional football employment in the United States", which "goes far beyond any possible need for fair protection . . . and imposes upon the player-employers or the purposes of the N.F.L. such undue hardship as to be an unreasonable restraint . . ."); *cf., North American Soccer League, et al.* v. *N.F.L., et al., supra,* (N.F.L. ban on cross-ownership of professional football and soccer league clubs violative of Sherman Act § 1).

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a "single entity" is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs—including the Raiders—which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts. This systemic cooperation trickles down to all members of the league, regardless of their on-the-field record, at least to the extent of the shared revenues. As at least one district court has previously recognized, despite some limited independently earned profit from "team paraphernalia" and "local broadcast revenues",

> (a) franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty.

Mid-South Grizzlies, supra, at 568. The ability to accrue separately accounted and disbursed profit, of which the district court made much, "is an indirect benefit of being a member of the league". *Id.*

A ruling that the N.F.L. cannot enforce Rule 4.3 is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club member, although this is precisely what each owner has contractually bargained for in joining the enterprise. Without power to reach collective decisions, the N.F.L. structure becomes superfluous, and professional sports, without a cost-effective policing mechanism such as the league, will dissolve in the face of uncontrollable free-riding and loss of economies of scale, *Broadcast Music, Inc.* v. *Columbia Broadcast Systems, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

Not only did the district court underrate the business scenario in which the member teams cooperate far more than they compete in the legally irrevalent on-field sense, but its directed verdict on the single entity issue ignored two significant aspects of the N.F.L.'s organization. First, the N.F.L. member clubs pool their revenues to a degree unique even amont sporting leagues. By focusing upon the separate calculation of profits and loss by members, the district court elevated form over substance. Profit, as currently understood in the accounting profession, is a term of art, and as such is inherently subjective, often manipulated by equity interests to serve legally irrevelant business motives. The relevant consideration, as the N.F.L. has recognized by implementation of its shared revenue concept, is total infusion of consumer dollars into the sport, and some predictable and centrally administered allocation of those jointly earned revenues among member clubs. After that purpose, the members adopt the only workable model for earning and distributing the revenues from sale of non-severable and indistinct product—professional football. See generally, Quirk, *An Economic Analysis of Team Movements in Professional Sports,* 38 Law & Contemporary Problems 42 (1973).

The product distributed by the member clubs is not analogous to ball bearings (*Timken Roller Bearing Co.* v. *U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951)), mattresses (*U.S.* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238

(1967)), or groceries (*U.S.* v. *Topco Associates,* 405 U.S. 596, 598, 92 S.Ct. 1126, 1128, 31 L.Ed.2d 515 (1972)), because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sand lot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of "separate business entities whose products have independent value" (519 F.Supp. at 584) banded together in *de facto* cartels. *C.f., Broadcast Music Inc., supra; Associated Press et al.* v. *United States,* 326 U.S. 1, 18, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945) (Douglas, J., in concurring, notes that it is unclear whether the AP system would violate Sherman Act § 1).

There was no evidence before the district court establishing that a member club of the N.F.L. could, or would seek to, defect to the U.S.F.L., thereby transferring its assets in quest of greater exploitation. Only such a showing, or an alternative theory, supported by evidence in the record could illustrate that any particular member club had an intrinsic value shorn of its affiliation with the N.F.L., and thus could support the district court's result. We find no such evidence in the record. *C.f. Associated Press, supra* (newspapers which sought to affiliate did not share revenues, and each produced separate and distinct products with intrinsic value). There is no evidence that any of the member clubs' investors would have committed time or capital investment without the existing league structure. Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition. *Accord, Perma Life Mufflers, Inc.* v. *Inernational Parts Corp.,* 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Not only is it legally irrelevant that a second professional league has sprung up, since the U.S.F.L. did not exist at the time of trial, but since the two leagues' schedules do not overlap, one should not hypothesize as to any competitive relationship between the two, or the effect such inter-league competition

would portend for the validity of intra-league regulation. Thus, while I find issues of supposed competitive relations between the N.F.L. and U.S.F.L., or between existing and any new franchisees, intellectually interesting, I also dismiss any legal conclusions based upon these entities as speculative.

Holding that the N.F.L. is not a single entity, but rather an aggregation of economic competitors, is tantamount to ruling that the N.F.L. structure is itself *per se* invalid under the Sherman Act § 1; this will spell the end of sporting leagues as are currently used in football, hockey, golf, soccer, basketball and countless other associations in industries with similar endemic characteristics. See *Board of Regents of the University of Oklahoma* v. *N.C.A.A.*, 707 F.2d 1147 (10th Cir.1983) *cert. granted*, ____ U.S. ____, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983).

To elevate formal corporate characteristics of ongoing economic entities above the substance of what purpose and function the structure serves, and what product(s) emerge from the process would not only destroy the N.F.L., professional sports leagues, and the goodwill that results from continuity in national allocation of the sport throughout the country, but would create a rule of law casting all franchise/wholesale distribution relationships into inescapable doubt.

Rather than avoid creating an "exemption" from the Sherman Act for professional sporting leagues, failing to account for the substantial and unique characteristics extant in professional sports by refusing the N.F.L. review as a single entity creates turmoil and dissolves the analytic framework within which courts scrutinize agreements under Sherman Act § 1. It is unrealistic and inaccurate to lump intra-N.F.L. rules in with agreements binding separate economic entities which produce independent products and accrue independent revenues. See *Mid-South Grizzlies, supra; Levin, supra.* Rule 4.3 is no more a restraint on trade in professional football for Sherman Act § 1 purposes, than is an intra-corporate directive regulating the location or operation of its headquarters, franchise, or branch of a multi-outlet

business. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

No "antitrust exemption" for the N.F.L. would be created by holding that it is a single economic entity for purposes of regulating franchise location. Section 2 of the Sherman Act, prohibiting monopolies and attempts to monopolize, remains fully applicable to all N.F.L. intra-league rules and activities. See *Mid-South Grizzlies, supra; c.f., Bowman* v. *N.F.L.*, 402 F.Supp. 754 (D.Minn.1975) (challenge brought by former W.F.L. players to N.F.L. teams as an illegal boycott and unjustified exercise of monopoly power); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D.Pa.1972) (Sherman Act § 2 applied to bar hockey reserve clause).

Many present N.F.L. practices, including Rule 4.3, are highly suspect under the Sherman Act § 2 prohibitions, because notwithstanding the form or substance of the N.F.L.'s style of organization and operation, some practices appear calculated to create barriers to entry for would-be rival leagues in profitable geographical markets. In short, Sherman Act § 2 is the proper curb upon the N.F.L.'s successful exploitation of its intra-firm economies of scale and competitive advantages. *Radovich* v. *N.F.L.*, 352 U.S. 445, 453-54, 77 S.Ct. 390, 394-95, 1 L.Ed.2d 456 (1957) and particularly *American Football League* v. *N.F.L.*, 323 F.2d 124, 131 (4th Cir.1963) suggest the possibility of true economic competitors challenging the effect of intra-league rules upon nascent competition under § 2 of the Sherman Act.

The Raiders do not have standing to challenge Rule 4.3 under § 2; as part and parcel of the entity they knowingly joined in 1967, they may have a cause of action in contract against the rest of the N.F.L. for failure of their expectations arising from their membership, but cannot challenge intra-league regulations, as could would-be "upstream" suppliers or hopeful candidates for franchises like the Mid-South Grizzlies or the San Francisco Seals. See *San Francisco Seals* v. *National Hockey League*, 379 F.Supp. 966, 971-72 (C.D.Cal.1974). The Coliseum may be able

to mount a successful challenge to Rule 4.3 upon a § 2 theory, but that issue is not presently before this Court.

As always, § 1 remains a viable theory under which those "upstream" aspects of member clubs' operations—those activities which the N.F.L. and previous courts acknowledge the individual members as economically distinct entities—could be challenged. An oft-tried, and frequently successful example of this theory has been the player draft litigation; the distinction between instances in which the N.F.L. acts as a collective monitor of intra-league affairs, and those in which it intercedes at the behest of a member club for anti-competitive advantage over "upstream" bargaining entities outside the N.F.L.

The purposes for which the N.F.L. should be viewed as a single entity, impervious to § 1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result. *See, Broadcast Music Inc., supra; GTE Sylvania, supra.* Prohibiting the N.F.L. from attempting to exploit a monopolistic position in the industry, or from cloaking concerted anti-competitive pressure upon extrinsic "upstream" suppliers in the guise of "league" restrictions, does not require that we strike ancillary terms of the franchise agreements between member clubs as anti-competitive. A principled approach requires that we distinguish one situation from the other, and protect both competitive markets for football players and television coverage, as well as the integrity of terms Al Davis agreed to as salient aspects of his arms' length negotiations with the other member clubs. Davis has received no more or less than he has bargained for, as a franchisee of the N.F.L.

To hold the N.F.L. a single entity for purposes of intra-league regulation of relocation of existing franchises, thereby cutting off Sherman Act § 1 liability in this instance, is fully consistent with the prior cases that address the validity of league regulation of member clubs. In such cases, the leagues' power has consistently been upheld. *See, e.g., A.F.L.* v. *N.F.L., supra; Mid-South Grizzlies, supra; San Francisco Seals, supra;* and *Levin, supra.*

I concur in the majority's opinion, insofar as it affirms the trial judge's denial of the appellants' motion for a change in venue. However, I would note the inappropriateness of applying the substantial body of case law dealing with racial bias in criminal venire to an instance where the strongest objections to the venue revolved around a highly attentuated [sic] financial or civic interest bestowed upon the jury by its deliberations concluding in favor of the L.A. Coliseum and Raiders. I would commend the trial judge for his extraordinary care in screening out prospective jurors who showed even a hint of bias, in maintaining an orderly proceeding despite the high degree of press coverage and histrionic advocacy by the parties, and in assuring deliberations in an informed and unemotive manner. As a result of his painstaking care, I find that the appellants received the verdict of six fair and untainted jurors.

CONCLUSION:

Because the district court incorrectly determined that the N.F.L. member clubs are not engaged in a single enterprise for purposes of determining the location and marketing of professional football games between members, the jury verdict on the lawfulness of Rule 4.3 must not stand. Rule 4.3 cannot, as a matter of law, violate § 1 of the Sherman Act. The judgment of the district court should be reversed and judgment entered for the N.F.L. and its codefendants.

APPENDIX E

APPENDIX E

United States District Court

C.D. CALIFORNIA

Nos. 78-3523-HP—July 24, 1981

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

Memorandum and Order granting directed verdict for plaintiff and cross-complainant on single entity issue

PREGERSON, *Circuit Judge:*

This matter is before the court on cross-motions filed, pursuant to Fed.R.Civ.P. 50(a), by the plaintiff Los Angeles Memorial Coliseum Commission, the cross-claimant Oakland Raiders, and the NFL defendants, seeking entry of a directed verdict with respect to the defendants' contention that the NFL is a single economic entity for purposes of this lawsuit and hence cannot as a matter of law have violated section 1 of the Sherman Act. Having studied the parties' briefs and heard the oral argument of counsel on July 24, 1981, the court concludes that the motions of the Coliseum Commission and the Raiders should be granted and that of the NFL denied.

The Los Angeles Memorial Coliseum Commission originally moved before trial for partial summary judgment on the single entity issue. The court denied that motion because it appeared that proper resolution of the issue could well depend on the factual evidence adduced at the trial. Because summary judgment is proper only when it is quite clear what the truth is, *Poller* v. *CBS*, 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962), a district court may properly deny summary judgment even where it would be technically proper, so that the case may be fully developed at trial. *Roberts* v. *Browning*, 610 F.2d 528, 536 (8th Cir.1979).

That development has now occurred, and it is apparent that there are no genuine issues of material fact concerning the single entity question. The parties' disagreement concerns the legal effect to be given to the undisputed facts. The question is a close one, and the court has benefitted greatly from the briefs and oral arguments of the parties. Careful consideration of the legal arguments put forward by the Coliseum and by the NFL have convinced this court that the undisputed facts preclude treating the NFL as a single entity for purposes of this lawsuit.

On its face, the NFL certainly appears to be an association of separate business entities rather than one single enterprise. The twenty-eight member clubs are separate legal entities—some corporations, some partnerships, and some sole proprietorships. No two clubs have a common owner. The clubs share a large part, but not all, of their revenues. They do not share their profits or losses. They are managed independently, each making its own decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators, and the terms of their stadium leases. They do not exchange or share their accounting books and records.

The Supreme Court has consistently rejected the single-entity argument in circumstances more favorable to that argument than those presented in this case. Firms with a high degree of common ownership have been held separate for Sherman Act purposes. *See Timken Roller Bearing Co.* v. *United States*, 341

U.S. 593, 597-98, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227-28, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947). Indeed, even a parent corporation and its subsidiary have been held separate entities in a Sherman Act context: since they had "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 982 (1968).

The Ninth Circuit has taken a similarly unreceptive view of single-entity claims, as demonstrated by *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). The defendants there were two newspaper-publishing corporations, one a wholly-owned subsidiary of the other. The Ninth Circuit was reluctant to characterize these firms as a single entity for Sherman Act purposes, stating only (in dictum) that they were "[a]rguably" one enterprise. Yet not only were the two firms parent and subsidiary, but one individual had control of the parent, was president of both corporations, and published all of both companies' newspapers. Moreover, the firms shared many key personnel, their newspapers exhibited numerous common features, and the two companies did not compete. If all these features together were insufficient to establish a single enterprise, it is difficult to see how the NFL can constitute a single entity when it possesses *none* of those features.[1]

The League argues, however, that the unitary nature of the product it creates—NFL football—necessarily implies that it is a

[1] The NFL is not the "parent" of any league member, nor do any two clubs have a common owner. The clubs do not share key operational personnel. And the NFL itself has conceded that "the existence of actual or potential inter-club competition in certain areas is not disputed." *NFL's Opposition to Motion for Partial Summary Judgment*, filed February 20, 1981 [hereinafter *NFL Opposition*], at 29.

single entity. "[T]he economic substance is that of a single firm selling a single product involving a necessary contribution from each member." *NFL Opposition* at 3. This argument suffers from several defects.

In the first place, the argument, if valid, would prove too much. If the NFL must be treated as a single entity in this lawsuit simply because all its teams must cooperate to produce the League product, the NFL should be just as much a single entity—and hence just as incapable of violating section 1 of the Sherman Act—in cases challenging League restrictions on the acquisition of players. Yet such League rules have repeatedly been found to violate section 1. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir.1978).[2]

Secondly, organizations whose product is just as unitary as the NFL's and requires the same kind of cooperation from the organization's members, have been found to violate section 1 of the Sherman Act. The clearest instance is *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), where Associated Press bylaws aimed at preventing competitors of existing members from joining the association were held unlawful. Associated Press was an incorporated membership association whose members were newspapers. It gathered and

[2] The NFL argues that the player cases are distinguishable because they challenged NFL conduct in a different market—the market for player services, rather than the market in which NFL football is sold. "In the player market . . . each club had the capacity to employ players without necessarily involving other clubs in such contracts," *NFL Opposition* at 39. The distinction is unconvincing. Each club likewise has the capacity to lease a stadium without involving the other clubs in its contract. Of course, the other clubs will be "involved" in the sense that they will have to play in the leased stadium. But they are similarly "involved" when one club employs a player in the sense that they will have to play against that player. In short, players no less than stadiums are a factor in producing professional football, and if the nture of professional football makes its producer, the NFL, a single entity, that conclusion would apply as much in the player market as in the stadium market.

distributed "news which [its] member papers cannot collect single-handed, and which requires their pooled resources." *Id.* at 26 (Frankfurter, J., concurring). This was a product or service distinct from that of the member publishers, and one requiring the cooperation of all the members, none of whom had the facilities or resources to produce AP's stream of worldwide news. Yet the Court had no trouble finding AP's anticompetitive bylaws a restraint of trade.[3] Likewise, in *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 365, 83 S.Ct. 1246, 1261, 10 L.Ed.2d 389 (1963), the Court held that the Exchange had violated section 1 of the Sherman Act. Yet the Exchange "perform[ed] an important function" by "serv[ing] . . . as an indispensable mechanism through which corporate securities can be bought and sold"—a function that none of its individual broker-members could perform on its own. *Id.* at 349, 83 S.Ct. at 1253.[4]

A third problem with the NFL's argument is that is seems to rest on a false premise—that the individual NFL clubs are not separate business entities whose products have an independent value. The League may be correct when it characterizes its

[3] *See also United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497 (1941), affirming the conviction of four corporations for violating section 1 of the Sherman Act. The defendants were GM, its sales and financing subsidiaries GMSC and GMAC, and a subsidiary of GMAC. The defendants had argued that they all directed their operations "toward one end, the manufacture and sale of General Motors automobiles," *id.* at 384, and that GMAC and its subsidiary were thus merely parts of one common enterprise engaged in the unitary business of making and selling GM cars. The court rejected this defense. *Id.* at 404.

[4] The NFL would distinguish *Associated Press* and *Silver* as involving "organizations made up of firms, each of which were self-contained competitors separate and independent of their membership in the umbrella cooperative," unlike the NFL's member clubs. *NFL Brief* at 22. This is not, in the court's view, a "distinction of substance" as the NFL believes. *Id.* at 23. As discussed below, any individual NFL team could, in theory, withdraw from the NFL and join or found a new league. A team could even withdraw and try to present non-league exhibition games, as the Harlem Globetrotters do. Such a venture might be almost certain to fail—but then so would a stock broker who dediced to quit the New York Stock Exchange and operate without a seat on any exchange.

member clubs as "[e]ntities which have capacity to be competitors *only* when acting jointly with members of a common enterprise." *NFL Brief on Cross-Motions for Directed Verdict re Single Entity*, filed July 23, 1981 [hereinafter *NFL Brief*], at 21. But this means only that each club must act jointly with *some* other teams in *some* cooperative framework in order to produce football games. It does not show that each club can produce football games only as an *NFL* member. Indeed, many of the current NFL members—including plaintiff Raiders—previously operated as members of a rival football league. There is no conceptual reason why any NFL team could not decide to pull out and join a new league.[5] Thus, although the Raiders can create a product only in collaboration with other teams, it does not follow that they "have no capacity to be competitors separate and apart from their membership in the National Football League." *NFL Brief* at 29. Indeed, sports fans quite often wish to spend their money on the games of a particular team, not simply on "NFL football," "NBA basketball," or the like.[6]

Besides stressing its allegedly unitary product, the NFL relies principally on *North American Soccer League* v. *NFL*, 505 F.Supp. 659 (S.D.N.Y.1980), and *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974). But

[5] The NFL might insist that although an individual club could secede from the League and continue to take part in producing football games, it would not be producing *NFL football*. But that is a mere tautology and in no way shows that the League's product has a special unitary quality. Even the most blatant coalition of competing enterprises, charged with a Sherman Act violation, could argue that no other entity except the coalition itself could produce a "coalition product": this would not mean that every such coalition must be considered a single business entity.

[6] For this reason, the NFL's analogy with *Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184 (3d Cir.1976), is unconvincing. *NFL Brief* at 19-20. That case involved a retailer, Hempfield, who operated the grocery departments of a number of defendant's K-Mart stores. The court found an absence of competition, since from a customer's viewpoint, "whether the . . . item was purchased from Kresge or from Hempfield, it was as if the item had been offered for sale by Kresge alone, but at two different locations in its K-Mart establishment." 544 F.2d at 1193. In our case, by contrast, few football fans would regard a Raiders game and, say, a Jets game as merely "NFL football" dispensed at different locations.

these cases do not help the League in this lawsuit, for they arose in far different contexts. The *North American Soccer League* case arose in the very different setting of a clash between two separate professional sports leagues, and Judge Haight specifically noted that the single entity defense "fails where two member teams would compete in the same geographical area for sports' fans dollars, and league restraint of that competition damages a stadium operator"—the precise situation alleged here. 505 F.Supp. at 677. *San Francisco Seals* turned on a finding that denial of the Seals's proposed move to Vancouver had no anticompetitive effect. That finding cannot automatically be transferred to this case, because the Seals, unlike the Raiders here, were not being prevented from moving into another team's home territory.

For the foregoing reasons, the court concludes that the NFL's member teams should be treated as separate business enterprises for purposes of this lawsuit, rather than as components of a single business entity. The NFL's arguments are by no means without force if marshalled in an attempt to demonstrate that the competitive activity of the NFL's teams presupposes a degree of mutual cooperation perhaps unique to the world of professional sports. But such unique features are relevant in weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense.

THEREFORE, IT IS ORDERED that the motions of the Coliseum Commission and the Raiders for directed verdict on the single entity issue be granted, and the NFL's motion be denied.

The Clerk of the Court is directed to serve copies of this order by United States mail upon the attorneys of record appearing for the parties herein.

APPENDIX F

APPENDIX F

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

Memorandum and Order Denying NFL's Motion for Reconsideration of February 28, 1983, Order re Standing

On February 18, 1983, this court denied the NFL's motion to dismiss the Coliseum's damage claim for lack of standing. On February 22, 1983, the United States Supreme Court reversed the Ninth Circuit's decision in *Associated General Contractors* v. *California State Council of Carpenters*, 648 F.2d 527 (9th Cir. 1980), and modified the analysis used in determining antitrust standing. 51 U.S.L.W. 4139 (U.S. Feb. 22, 1983) (No. 81-334). On February 28, 1983, the NFL filed a "Supplemental Brief in Support of Dismissal of the Coliseum's Damage Claim for Lack of Standing," pointing out to the court the Supreme Court's action in *Carpenters*. Treating the NFL's Supplemental Brief as a motion to reconsider the February 18 order, the court rules as follows:

The Supreme Court in *Carpenters* identified seven factors to "circumscribe and guide the exercise of judgment" in determining standing on a case-by-case basis. Slip op. at 18. Application

of these factors to the instant case indicates that this court's February 18 order need not be vacated or modified in light of *Carpenters*.

First, the Court in *Carpenters* held that the "causal connection between an antitrust violation and harm to [a plaintiff]" is a factor to be considered in determining standing. *Id.* Here, the jury in the liability phase of the trial has already established that the NFL's enforcement of Rule 4.3 caused the Coliseum injury in fact.

Second, the Court held that an "[a]llegation of improper motive . . . may support a plaintiff's damages claim." *Id.* The jury here has not made a finding regarding the NFL's motives in relation to the Coliseum. Specific intent of an antitrust conspirator to harm a plaintiff, however, is not a prerequisite of standing to claim treble damages. *Blue Shield* v. *McCready*, 102 S. Ct. 2540, 2548 (1982).

Third, the Court stated that a central consideration in determining standing is whether the plaintiff's alleged injury is the type of injury that Congress intended to prevent in enacting antitrust legislation. *Carpenters*, slip op. at 19. One of the purposes of the Sherman Act, the Court noted, is to protect "the economic freedom of participants in the relevant market." *Id.* Here, the jury's verdict in the first phase of the trial determined that the NFL's actions restrained competition among cities, including stadia, competing for NFL teams (*see* liability instruction #26). Thus, the Coliseum was a participant in a market restrained by the NFL's unlawful conduct.

Fourth, the Court in *Carpenters* found that the plaintiff's injury was indirect and based on a chain of causation with "somewhat vaguely defined links." *Id.* at 21-22. This is not the case here. Implicit in the jury's liability verdict is the existence of a direct connection between the NFL's enforcement of Rule 4.3 and the delay experienced by the Coliseum in agreeing upon a final lease with the Raiders.

Fifth, the Court stated that the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party

[standing]." *Id.* at 23. In the instant case, the jury was instructed to determine whether the NFL's actions restrained competition in two product markets: the market of NFL teams or other forms of entertainment and the market of cities, including stadia, competing for NFL teams (*see* liability instruction #26). While the Raiders are the most likely plaintiff to contest a restraint in the former market, the Coliseum is the most likely plaintiff in the latter market.

Sixth, the Court in *Carpenters* stated that another relevant factor was the speculativeness of the plaintiff's damage claim. *Id.* at 24. The Coliseum, unlike the plaintiff in *Carpenters*, rests its damage claim on a written memorandum of agreement that provides a tangible basis upon which damages can be reasonably estimated.

Finally, the *Carpenters* Court recognized "the importance of avoiding . . . the risk of duplicative recoveries on the one hand, [and] the danger of complex apportionment of damages on the other. *Id.* at 24-25. Duplicative recovery and the apportionment of damages are not concerns here because the only other entity injured by the NFL's unlawful conduct, the Raiders, is already a party to this suit.

Based on the above analysis, the NFL's motion to reconsider this court's February 18, 1983, order is denied.

IT IS SO ORDERED.

The Clerk of the court shall serve copies of this Memorandum and Order upon the attorneys of record for the parties appearing in this action.

Dated: March 30, 1983

HARRY PREGERSON
Harry Pregerson
UNITED STATES CIRCUIT JUDGE
(sitting by designation)

APPENDIX G

APPENDIX G[1]

United States District Court

C. D. CALIFORNIA

Civ. No. 78-3523-HP—Feb. 21, 1980

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE, et al.,
Defendants.

Memorandum and Order granting plaintiff's motion for a preliminary injunction

PREGERSON, *Circuit Judge,* sitting by designation.

This matter is before the court on plaintiff's motion for a preliminary injunction, which, according to plaintiff's moving papers, "could equally well be viewed as seeking summary judgment." After considering the pleadings, the memoranda of law, the affidavits, and the oral argument of counsel, the court has determined that the motion for a preliminary injunction should be granted. Insofar as the motion seeks summary judgment, however, summary judgment is denied.

In this action, the Los Angeles Memorial Coliseum Commission ("Coliseum"), seeks an injunction restraining the National Football League ("NFL") from invoking § 4.3 of the NFL's Constitution and Bylaws in connection with the contemplated transfer of the Oakland Raiders Football Club to the Los Angeles Memorial Coliseum. Section 4.3 requires an affirmative vote of three-fourths of the NFL team owners before a member club may transfer the location of its home games from one city to

[1] This order was reversed on other grounds by the Court of Appeals. 634 F.2d 1197 (9th Cir. 1980).

another.[2] The Coliseum claims that § 4.3 constitutes a division of territories among competitors, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, the Coliseum seeks to enjoin the NFL from invoking the three-fourths vote requirement on the ground that enforcement of § 4.3 threatens to block the Coliseum and the Oakland Raiders from finalizing an agreement that would bring the Raiders to Los Angeles as the Coliseum's new NFL tenant.

In earlier proceedings on the motion to dismiss the complaint, this court found that plaintiff had not adequately alleged standing to bring the action. In an order dismissing the complaint with leave to amend, *Los Angeles Memorial Coliseum Commission* v. *N. F. L.*, 468 F.Supp. 154 (C.D. Cal. 1979), this court further stated that, assuming plaintiff could successfully amend the complaint to plead the prerequisites for standing, the legality of § 4.3 must be determined under a rule of reason analysis, because its mere existence did not constitute a per se violation of the Sherman Act.

The court finds that plaintiff has now met the standing prerequisites set out in the court's prior order, 468 F.Supp. at 162. Thus, plaintiff has alleged the following:

1) that it is reasonably likely that an existing NFL team is seriously interested in moving to Los Angeles;

2) that it is reasonably likely that a transfer team would decide to play its home games in the Coliseum;

3) that it is reasonably likely that a transfer team and the Coliseum would be able to agree on lease terms; and

4) that it is reasonably likely that pursuant to § 4.3, the NFL members will not approve the transfer of an existing team to Los Angeles and the Coliseum before the 1980-81 season.

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[2] Section 4.3 provides: "No member club shall have the right to transfer its franchise or playing site to a different city . . . without prior approval by the affirmative vote of three-fourths of existing member clubs of the League."

Turning to the question of plaintiff's entitlement to an injunction under § 16 of the Clayton Act, the court notes that § 16 provides for injunctive relief against threatened loss by a violation of the antitrust laws "when and under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity," 15 U.S.C. § 26. Therefore, before injunctive relief may be granted under § 16, the court must first determine whether plaintiffs have satisfied either of the two traditional equitable standards applicable to the grant or denial of a preliminary injunction.

I. PRELIMINARY INJUNCTION STANDARDS

In *William Inglis & Sons Baking Company* v. *I. T. T. Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1976), the Ninth Circuit set out two possible bases on which a preliminary injunction may be granted. The first requires the moving party to show (1) probable success on the merits, and (2) the possibility of irreparable injury. The second, or alternative, preliminary injunction standard requires the moving party to demonstrate only that (1) the suit raises "serious" questions of law, and (2) that the balance of hardships tips sharply in its favor. *See also Miss Universe, Inc.* v. *Flesher*, 605 F.2d 1130 (9th Cir. 1979).

Under the second standard, plaintiff is required to show that the balance of hardships tips sharply in its favor. Such a showing seems unlikely in this case since the alleged injury to the Coliseum in the absence of an injunction, i.e., lost revenues due to its failure to acquire an NFL team, is nearly evenly balanced by the financial injury that granting the injunction could cause to a third party, the Oakland Coliseum, due to its possible loss of the Raiders. This conclusion prevents the application of the alternative standard but does not end the court's inquiry. Under the first standard, plaintiff has demonstrated the requisite possibility of irreparable injury. This is so because the managing partner of the Raiders has indicated both that his club desires to play its home games in Los Angeles, and that the only significant obstacle to

reaching an agreement with the Coliseum is the possible invocation of § 4.3. Having concluded that the possibility of irreparable injury exists, what remains, under the first standard, is for the court to determine whether plaintiff has shown a probability or a likelihood of success on the merits of its antitrust claim.

This court has already ruled that the legality of § 4.3 must be tested under the rule of reason. *Los Angeles Memorial Coliseum, supra,* 468 F.Supp. at 164-166. Under the rule of reason, "the court must balance the anticompetitive evils of the challenged restraints against their procompetitive virtues to determine whether the restraints are reasonable and thus legal." *Id.* at 167. Thus, to determine whether plaintiff has shown that it is likely to succeed on the merits, the court, on the facts presently before it, must undertake a preliminary rule of reason analysis by weighing the procompetitive and anticompetitive effects of § 4.3. If the anticompetitive effects appear to outweigh the procompetitive justifications, a preliminary injunction in plaintiff's favor would be in order.

II. PRELIMINARY RULE OF REASON ANALYSIS

The court's previous order set out the following as a procompetitive virtue of § 4.3:

> In order for professional football games to be played (and thus for economic competition to exist), the teams . . . must agree on *where* the games are to be played. Games, traditionally, are played where one of the participating teams has its home city. Therefore, an agreement on where the games are to be played necessarily involves an agreement on the location of each team's home city. [Section] . . . 4.3 provide[s] a mechanism whereby the NFL teams can agree on where each transfer . . . team is to be located—to that extent [that section is an agreement] on where games are to be played.

468 F.Supp. at 166. It was this apparent procompetitive virtue which provided the court with the following rationale for adopting the rule of reason, rather than a per se rule, as the appropriate mode by which to evaluate the lawfulness of § 4.3:

> Because these agreements promote competition to some extent, it cannot be said that they have a 'pernicious effect on competition' or that they lack 'any redeeming virtue.' *Northern Pacific R. Co.* [v. *United States,*], 356 U.S. [1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)] at 5, 78 S.Ct. at 518.

468 F.Supp. at 166.

In addition to functioning as a device to determine the sites where games are to be played, defendants have asserted that § 4.3 has certain other procompetitive aspects. The NFL argues, for example, that the rule "protects the value of each team's enterprise," and that it "provides the necessary incentive to develop and nurture such businesses." *See* NFL Brief in Opposition to Motion for Preliminary Injunction, 12-17. These justifications, however, seem to advance an argument that § 4.3 is procompetitive because it helps stabilize the professional football industry, by increasing profits and preserving the value of team franchises.

According to a recent opinion of the Supreme Court:

> The early cases . . . foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition . . . That kind of argument is properly addressed to Congress and may justify an exemption from the statute for special industries, but it is not permitted by the Rule of Reason.

National Society of Professional Engineers v. *United States,* 435 U.S. 679, 690, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 (1978) (citations and footnote omitted). Thus, although "profit maximization is certainly in the best interests of the football industry, it is not, by itself, a procompetitive justification and, under

Professional Engineers [*Id.* at 692, 98 S.Ct. at 1365], may not be factored into the reasonableness determination." *Los Angeles Memorial Coliseum, supra,* 468 F.Supp. at 167.

The primary anticompetitive aspect of § 4.3 is fairly self-evident: a rule which inhibits teams from transferring their home locations may act to prevent an existing team from transferring into the Los Angeles-Orange County area to compete with a team already there for dollars in the pockets of sports fans. In addition, a rule which hinders a new NFL team from moving into Los Angeles would inhibit local competition for football players, coaches, and other personnel. The extent to which a League's voting requirements restrict transfers of home locations from one city to another is, of course, dependent on the size of the vote required to approve a transfer. If an NFL team, desiring to play its home games in Los Angeles, must first win the unanimous approval of all teams in the League,[3] then its intentions obviously could be frustrated by the negative vote of a single team. Lower percentage vote requirements would, of course, constitute less of an obstacle to individual team decision-making, and would still provide a mechanism for determining the locations at which games are to be played.

This court's previous order noted that the mere fact that "some sort of agreement is needed to determine where each team is to have its home city ... does not necessarily mean that it is reasonable and thus legal for the agreement to contain a three-fourths vote requirement." 468 F.Supp. at 166.

In a rule of reason case, the Ninth Circuit quoted with approval the following language from a Supreme Court decision:

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is *fairly necessary*, in the circumstances of the particular case ..." *Dr. Miles*

[3] When the present suit was first filed, § 4.3 required a unanimous vote to approve transfers. *See* Plaintiff's Supplemental Brief, Appendix A.

Medical Co. v. *Park & Sons Co.*, 220 U.S. 373, 406, 31 S.Ct. 376, 384, 55 L.Ed. 502 (1911).

Anderson v. *American Automobile Association*, 454 F.2d 1240, 1246 (9th Cir. 1972) (emphasis added). In other words, although defendants can show that the rule in question has sufficient procompetitive merit to justify examining its lawfulness under the rule of reason analysis, a court may not uphold the restraint unless, with respect to the public and the parties, the restraint is limited to what is fairly necessary to obviate the concerns that brought it into being. If the restraint is more restrictive than "fairly necessary, in the circumstances of the particular case" it will be considered unreasonable, and thus in violation of § 1 of the Sherman Act.

In this case, the rule of reason analysis applies because some agreement among the teams is essential to permit the formation of an organized league. In determining whether the agreement or rule in question is reasonable, however, the court should assess the rule's ability to accommodate two competing interests: (1) the interests of the NFL in binding member teams to an agreement on where games will be played, and (2) the interest of the individual team in establishing its home location in whichever city it selects. A three-fourths vote requirement, by which eight out of twenty-eight teams can block the transfer of another team, appears to more than meet the NFL's interest, while giving marginal support to the interest of the individual team desiring to relocate. A majority vote requirement, on the other hand, would seem to provide a fairer accommodation of league and individual team interests. Furthermore, a majority vote requirement, in a matter affecting the public interest, is more consistent with the traditions of our democratic society.

Although the court considers the question to be close, the balance on the rule of reason scale appears to tip slightly in favor of plaintiff. Plaintiff has therefore shown sufficient likelihood of success on the merits to be entitled to a preliminary injunction.

The record is insufficient, however, to permit the court to grant plaintiff summary judgment. As was made clear during the hearing on the preliminary injunction motion, *see* Reporter's Transcript at 76-77, several material facts remain in dispute. Further evidence as to the business of professional football, the purpose, effect, nature and history of § 4.3, the reason why the rule was imposed, and plaintiff's threatened injury must still be added to the record before the court will be in a position to rule on a motion for summary judgment under Fed.R.Civ.P. 56.

III. THE INJUNCTION

IT IS HEREBY ORDERED that defendants are enjoined, pending the determination of this action, from enforcing § 4.3 of the National Football League's Constitution and Bylaws, as currently written, to prevent the Oakland Raiders Football Team, or any other NFL football team, from transferring the location of its home games to the Los Angeles Memorial Coliseum. It is, of course, understood that such an injunction, which merely restrains the invocation of § 4.3, does not force or require any team to take any action against its will.

IT IS FURTHER ORDERED that this Memorandum and Order shall constitute the court's findings of fact and conclusions of law as authorized by Fed.R.Civ.P. 52.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum and Order, by United States mail, upon the attorneys of record for the parties appearing herein.

APPENDIX H

APPENDIX H

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,

Defendants.

OAKLAND RAIDERS, LTD.,

Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,

Cross-Defendants.

FINAL DECREE

The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to § 16 of the Clayton Act (15 U.S.C. § 2) [sic].

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have unreasonably restrained trade and commerce in violation of § 1 of the Sherman Act;

2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

3. The officers, agents, servants, employees and attorneys of each defendant, and all persons in active concert or participation with them, or any of them, are permanently enjoined from doing any act that defendants are hereinabove enjoined from doing.

4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered.

5. It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and cross-claimant each shall have and recover its costs of suit, including a reasonable attorneys' fee, the amount thereof to be fixed by the Court hereafter at such time as the Court shall determine.

6. Jurisdiction is retained for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, or for the enforcement of compliance thereof, and punishment of violations thereof, and to determine the damages recoverable by plaintiff and cross-claimant against defendants.

Dated: June 14, 1982.

HARRY PREGERSON
UNITED STATES CIRCUIT JUDGE
Sitting by Designation

BEST AVAILABLE COPY

APPENDIX I

APPENDIX I

Department of Justice

STATEMENT

OF

CHARLES F. RULE
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

PROFESSIONAL SPORTS ANTITRUST LEGISLATION

ON

JUNE 12, 1985

Mr. Chairman and members of the Committee:

I am pleased to be here today to present the views of the Department of Justice on S. 298, S. 259, S. 172 and S. 287, all of which address perceived problems common to professional sports leagues. The Department understands the concerns that underlie these bills, and we believe that a procompetitive, non-regulatory solution to the franchise relocation problem is necessary. However, for the reasons that I will discuss in my testimony today, the Department opposes the enactment of any of these bills in their present form.

I will begin by summarizing the four bills. As a general matter, S. 298, S. 259, S. 172 and S. 287 all address professional sports franchise relocation. Three of the bills would explicitly provide an antitrust exemption for at least some agreements among a league and its teams that restrict team movement. In addition, all of the bills except S. 298 would regulate franchise relocation by creating standards of criteria that would have to be met (to the satisfaction of either the courts or an arbitration board) in order for a league-approved franchise relocation to be lawful. Some of the bills also address sports league practices other than franchise relocation. Thus, some of the bills would afford antitrust exemptions to league agreements on revenue pooling and the selection and termination of owners, and S. 287 would regulate access to publicly-owned or operated professional sports facilities and require certain sports leagues to expand.

Looking more particularly at each bill, S. 298 would create an antitrust exemption for professional basketball, football, hockey, and soccer leagues to enforce rules authorizing league members to block relocation from league-franchised home areas. Thus, a league decision to block a relocation would be exempt; a decision to allow a relocation could be challenged in court under the antitrust laws. S. 298 also would create an antitrust exemption for leagues to enforce rules for the division of revenues that "tend to promote comparable economic opportunities for the member clubs."

In contrast to S. 298, S. 259 takes a "standards approach" to franchise relocation. The bill would create an antitrust exemption for a professional sports league to enforce rules authorizing its members to block or permit relocation out of a team's home territory. In order to enforce a franchise relocation rule or agreement, a league must file it with the Secretary of Commerce, who would publish a descriptive notice in the Federal Register. Before applying the rule in a particular case, the league must "conduct proceedings" at which "interested parties" are afforded an opportunity to present oral or written testimony. S. 259 states that a league's relocation rule "shall require" that the league consider and make specific findings regarding 13 listed factors in determining whether a move is "reasonable and appropriate."[1] The 13 factors include such things as the relocating team's profitability, the adequacy of its stadium, the extent to which the team has received unamortized public financial support, and the extent to which the team's financial problems are the fault of its owner. The league's determination whether a move is "reasonable and appropriate" could be challenged in a "neutral" federal court; if a court found that the league had not followed appropriate procedures in determining whether to block a proposed relocation, the court could, among other things, order the league to conduct additional proceedings. Finally, S. 259 would create antitrust exemptions for league rules in two other areas—revenue pooling and team ownership standards, providing that certain criteria outlined in the bill are met.

S. 172, which is limited to professional football, would make it unlawful for any team that has played its home games in a municipality for six or more years to relocate unless the team meets one of three criteria, which are similar to some of S. 259's 13 factors. A team that seeks to relocate would be required to provide notice to the local government authority. Where an owner intends "to sell the team and relocate it," the local government—or anyone selected by the local government—would have a right of first refusal to purchase the team. Alternatively, if the local government authority decided that the statutory relocation criteria were not met, it could bring a civil action to enjoin the

[1] The "shall include" language is ambiguous, and does not indicate what happens if the relocation rule does not include the 13 factors.

move and seek other equitable relief and damages. S. 172 would create an antitrust exemption of uncertain scope for any agreement among teams that restricted team movement in "accordance with the [bill's] criteria."

S. 287, which applies to professional baseball, football, basketball, and hockey leagues that have been in existence for at least seven years, provides that no team may relocate unless the move is found to be "necessary and appropriate" by both its league and an ad hoc, three-person arbitration board. Both the league and the board would have to consider nine criteria listed in the bill, which are similar to those in S. 259 and S. 172. If the board found relocation to be "necessary and appropriate," it would then consider whether any offer that would retain the team in its community had a value greater than or equal to the proposed relocation; if so, it would disapprove the relocation. The availability and scope of judicial review of the board's decision are unclear. While S. 287's "regulatory" approach appears to displace the antitrust laws from whatever application to franchise relocations they otherwise would have, the bill does not contain an explicit antitrust exemption for franchise relocation rules.

S. 287 does, however, provide that the antitrust laws "shall not apply" to an agreement among the members of any professional sports league to require the members to share revenues generated by television contracts. This provision is intended to resolve any possible ambiguity regarding the existing television pooling provision in 15 U.S.C. 1291.[2] In addition, S. 287 mandates that each publicly-owned or operated professional sports facility be available for use by all professional teams "on fair and reasonable terms and without unfair discrimination," under standards described in the bill. Finally, S. 287 would require Major League Baseball and the NFL either to expand in a specified manner or be deemed to have violated section 2 of the Sherman Act.

* * *

These bills raise a number of important issues. Today, I want to address two of those: first, whether an antitrust immunity is

[2] See 131 Cong. Rec. S665 (daily ed. Jan. 24, 1985) (statement of Sen. Gorton.)

appropriate for some sports league rules; and second, whether the antitrust laws should be supplanted by some alternative legal regime that balances interests in addition to, or other than, those underlying the antitrust laws in evaluating a league's decision to block franchise relocations.

With the exceptions of Major League Baseball, league sales of broadcast television rights, and the 1966 merger of NFL and AFL, professional sports league practices are subject to the antitrust laws. Current law requires that the courts apply antitrust rules to sports leagues in a manner that accommodates the unique characteristics of professional team sports. An important characteristic to which antitrust analysis must be sensitive is the need for "on-field parity" of the teams in a league. While fans generally may have a favorite team in a particular game, the demand for viewing a game is enhanced by the uncertainty about which team will win. Few of us enjoy lopsided games. While the fans of a dominant team might continue to attend the games of a league marked by an absence of parity to see their team trounce the opposition, other fans would soon grow weary of the ineptitude of the weaker teams. As a result, overall demand for the league's games will decline, and consumer welfare will be reduced from what it would be if the league were able to take actions necessary to promote parity.

From an economist's viewpoint, the best way to ensure optimal parity is to have a single entity control the league. That entity could allocate players, coaches and facilities in a way that maximized on-field competition and could correct any competitive imbalance that might arise. That's all well and good in theory, but those of us fans who are not economists would find it a little "fishy" that the same owner controlled both teams out on the field. We might begin to believe that the outcome of games was predetermined, and our interest in games might cool. Thus, in addition to parity, each team must also maintain its competitive independence. Maintaining this balance between on-field parity and team rivalry is the primary objective of many sports leagues rules that in other industries would be viewed with great suspicion. In general, the antitrust laws have proven sufficiently

flexible to accommodate this balance. Thus, for example, player drafts, which tend to promote an even distribution of player talent throughout a league, are judged under a rule of reason analysis,[3] whereas an agreement among competitors in other industries to allocate among themselves the right to purchase inputs would generally be *per se* illegal.[4]

In general, a professional sports league should be viewed as a joint venture. The antitrust laws recognize that, as to joint ventures in general, some limitations on competition among the members may enhance consumer welfare. In the case of sports leagues, some limitations may be necessary to ensure parity among the teams. At the same time, general joint venture analysis recognizes that, depending on the circumstances, unnecessary elimination of competition among the members of the venture can restrict output and thus harm consumer welfare. Accordingly, the need for some cooperation among the members of a joint venture does not necessarily justify any and all limitations on their ability to compete with one another.

The Supreme Court's recent decision in the *NCAA* case[5] reflects the appropriate judicial approach to applying general antitrust principles to team sports. In *NCAA*, the Court applied a rule of reason analysis (advocated in the government's *amicus* brief). The Court concluded that the NCAA's prohibition on member schools' ability to negotiate independent television contracts violated the antitrust laws because the prohibition was not reasonably necessary to promote on-field parity, and because the NCAA had market power. This conclusion appears well-founded: in the year since the decision, the number of games broadcast has doubled, the number of viewers has increased by 10% and revenues on the broadcasts have declined by 50%—which suggests an erosion of prior supracompetitive profits. The *NCAA* decision illustrates two important points: (1) properly

[3] *See Smith v. Pro Football, Inc.*, 593 F.2d 1172, 1177-1189 (D.C. Cir. 1978).

[4] *See, e.g., United States v. Capitol Service, Inc.*, 756 F.2d 502, 505-507 (7th Cir. 1985)

[5] *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

applied, the antitrust laws do not ignore the special attributes of the sports business; and (2) the antitrust laws can serve a useful economic purpose in the context of sports.

* * *

With this background on the general relationship between sports and the antitrust laws, I would like now to examine the legal and economic merits of the proposed exemptions for franchise relocation rules and revenue pooling.

The current state of the antitrust law concerning franchise relocation rules is somewhat confused. There are only two reported decisions applying antitrust standards to league restrictions on franchise relocation, and those decisions came to opposite conclusions. In *Los Angeles Memorial Coliseum v. NFL* (the "*Raiders*" case),[6] plaintiffs challenged an NFL rule that required three-fourths of the league owners to approve any relocation. The rule was invoked to block the move of the Oakland Raiders to the Los Angeles Memorial Coliseum, which was located in the same metropolitan area as another NFL team. The court of appeals applied a rule of reason analysis and held that substantial evidence supported the jury's determination that the particular rule in question was an unreasonable restraint of trade in violation of the Sherman Act. The *Raiders* court did not hold that all possible league restraints on franchise relocation would be unlawful; but on the facts of the *Raiders* case, the court concluded, the NFL could have designed a less restrictive rule that would have served its interest in producing its product but would not have foreclosed competition among its teams.

In contrast to the *Raiders* case, league restrictions on franchise relocation were upheld in *San Francisco Seals Ltd. v. NHL* (the "*Seals*" case),[7] where the court rejected a hockey team's Sherman Act challenge to the NHL's denial of its request to move from San Francisco to Vancouver, a community that had no NHL franchise. The *Seals* court reasoned that in the context of

[6] 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

[7] 379 F. Supp. 966 (C.D. Cal. 1974).

that particular dispute, the Seals and other NHL teams were not competitors in the economic sense but rather were members of a single unit competing with other similar professional leagues.

The different conclusions in the *Raiders* and *Seals* cases reflect the problems that result from attempts by courts to evaluate the competitive effects of a league's franchise relocation decisions. A professional sports league's decision to block a franchise move to another team's area may either enhance or reduce consumer welfare, depending on the circumstances. A league's decision to block a franchise relocation will not harm competition when the effect of that decision is to increase output (*e.g.*, viewership) of the league and its teams. Assessing the effect of a league's relocation decision on output involves examining the effects on consumers (fans) in the city from which the team would be moved and in the city to which it would move, as well as on fans in other cities (who may, for example, be less loyal to their team if they fear it will move). As a practical matter, our analysis to date strongly suggests that the league's choice is highly likely to be procompetitive or competitively neutral.

Unfortunately, it is extremely difficult for courts correctly to determine whether a league's blocking of a particular franchise relocation benefits or hurts consumers because of the complexity of the trade-offs between consumer welfare gains and losses.[8] We have been unable to discern any readily apparent rules of thumb (*e.g.*, market power of the league or team) that can facilitate an effort to determine whether the league's decision is likely to be

[8] In some situations, the league will want—and it will be socially beneficial—to block relocations that are desired by individual teams. In other situations the league could block relocations that could be socially beneficial.

Proper evaluation of these trade-offs would require estimates of the likely expansion of output in the city into which the team moved, along with the increased consumer surplus in that city; similar estimates for decreases in output and consumer surplus would be required for the city from which the franchise is moved. Expert testimony would be necessary in each of these areas; but these are areas where the ability of economists to make empirical judgments is limited.

consistent with antitrust policies.[9] Thus, one cannot have great confidence that in the case of franchise relocations the courts are capable of developing rules and precedent that will allow them to determine the consumer welfare effects of a league's decision. And therefore, because of limitations inherent in the judicial process, because of the consumer welfare costs of a court incorrectly overruling a league's decision to block a franchise relocation, and because of our conclusion that a league's decision generally will promote consumer welfare, courts should defer to a league's decision to block a franchise relocation. In effect, a league's franchise relocation rule should be deemed *per se* lawful, unless it adversely affects competition with other leagues or is merely a subterfuge to disguise some other egregious anticompetitive conduct. The Department would not, therefore, oppose an antitrust exemption for league decisions to block franchise relocations.

Our analysis of the proposed exemption for revenue pooling leads to a very different conclusion. Both S. 298 and S. 259 would create an antitrust exemption for leagues to enforce revenue pooling rules that "tend to promote comparable economic opportunities" for the member clubs. This broad exemption would allow a sports league to pool all revenues derived by its member teams and divide them evenly among the teams, without regard to the possible anticompetitive effects of pooling in markets in which the teams compete with one another (*e.g.*, the market for sale of cable television rights). The need for "parity" within a sports league does not justify this exemption. Antitrust analysis currently recognizes that need, as the recent *NCAA* decision demonstrates. We know of no adverse judicial decisions regarding the pooling of revenues by professional sports leagues that would even begin to justify an antitrust exemption for such rules. Moreover, immunized revenue pooling rules might well lead to significantly anticompetitive conduct in important areas,

[9] There are, however, rules of thumb that indicate that competition is *not* harmed by blocking certain franchise relocations. For example, blocking a move to a city that otherwise does not have a franchise is not a competitive threat and should be found to be legal. The *Seals* case involved such a situation, and the court had little difficulty finding the league's actions lawful.

such as the sale of games for cable television.[10] While some revenue pooling can be an appropriate means for promoting on-field parity under certain circumstances, it can also go too far, creating an unjustified restraint on competition. Thus, revenue pooling should be subject to a rule of reason antitrust analysis—an analysis, unlike that available for franchise relocations, that can relatively easily determine whether revenue pooling promotes or harms consumer welfare. Particularly in light of the *NCAA* precedent, and the apparent benefits from that decision, a broad grant of immunity to revenue pooling rules is plainly inappropriate.

The Department is also unpersuaded that there is a need for S. 259's exemption for league actions regarding the selection and termination of owners. In contrast to the flexibility provided by the antitrust laws for dealing with individual competitive contexts, the exemption proposed by S. 259 would exempt league rules regardless of their purpose and competitive effect. This broad exemption would appear to permit a league, for example, to use such a rule to inhibit the ability of other sports leagues to compete. There is no justification for such a result.

As this Committee knows, the Department of Justice is generally opposed to antitrust exemptions, and we do not lightly come to the conclusion that an antitrust exemption for franchise relocation rules may be appropriate. The Department firmly believes that maximum reliance on the marketplace is essential to protect this nation's economic and political liberties. Competition, with very rare exceptions, is also the best guarantee that our society's resources will be allocated efficiently and that American consumers will be as well off as possible. The antitrust laws, when properly applied, simply protect the marketplace from private (and to some extent governmental) restraints. At times, however, courts and government enforcers have inappropriately

[10] In 1961, Congress exempted from the antitrust laws agreements by which the member clubs of professional football, baseball, basketball, or hockey leagues pool their separate rights in the "sponsored telecasting" of their games and sell those pooled rights to one or more purchasers, such as television networks. 15 U.S.C. §1291. Leagues currently pool revenues from such sales.

applied the antitrust laws in a way that interfered with, rather than protected, the marketplace, with the result that the antitrust "cure" was worse, in terms of damage to the marketplace, than the competitive "disease" at which it was aimed. Such is necessarily the case with efforts by the courts to second-guess a league's decisions concerning franchise relocations. Perhaps the courts in time will correct the situation with some form of *per se* rule of legality for such decisions. However, because of the uniqueness of professional sports and their place in American life, the cost of leaving the solution to the courts may be prohibitive and makes a limited immunity appropriate.

Let no one be misled by our support for such an exemption, however. We view it as a unique situation. We will continue to oppose vigorously those antitrust exemptions that would inappropriately protect some industry or industry practice from the rigors of the marketplace. We recognize that most exemptions, because they are backed by the coercive power of the government, can seriously threaten competition and consumer welfare. The Department thus has concluded that, despite the unique characteristics of professional sports, an antitrust exemption for revenue pooling and selection and termination of owners is not warranted.

* * *

While some antitrust exemption for franchise relocations may be appropriate, the Department strongly opposes any attempt to impose a new and different legal regime to regulate franchise relocations. Such a new regime threatens to be an even greater threat to consumer (*i.e.*, fan) welfare than the risk of improper application of the antitrust laws that it would replace.

S. 172, S. 259 and S. 287 all would specify new standards for determining the legality of various sports league rules. Courts or specially-created federal arbitration boards would be the ultimate arbiters of whether particular franchise relocations were "reasonable and appropriate," taking into account, in some unspecified manner, a prescribed array of factors. Thus, these

bills would place decisions by sports teams and leagues concerning franchise relocation under a new and unique regulatory regime.

The heavy-handed regulation contemplated by the bills runs counter to the laudatory trend toward deregulation in our economy generally. Our nation's fundamental economic policy is reliance on marketplace competition free from public and private restraints, rather than on unneeded state or federal regulation, to determine the location of businesses. Economic efficiency and consumer welfare are enhanced by allowing firms to locate where their costs are lowest and the demand for their products is greatest. The typical firm is free to relocate in order to reduce its costs (*e.g.*, wages, taxes, transportation) or to stimulate demand for its product. In general, Congress wisely has not interfered with market processes by regulating business relocation. By the same reasoning, government interference in the relocation of professional sports franchises also should be avoided.

Similarly, the Department believes that there is no justification for the legislatively-mandated expansion of Major Baseball League and the NFL proposed by S. 287. In a free-market system, firms—not regulators or legislators—are generally considered the best judges of how and where their products are marketed. Congress does not mandate that steel manufacturers, for example, must open new plants in specific cities according to a specific schedule. The assessment of demand and the amount of athletic and managerial talent available to satisfy this demand are best left to the judgment of the NFL and Major League Baseball. Finally, S. 287's provisions concerning access to facilities are also unwarranted. There is no reason to believe that the standards of the antitrust laws are too inflexible to afford adequate access to new or competitive sports facilities.

Professional sports have become so popular precisely because the entrepreneurs who own teams have been able to respond to market forces. Indeed, professional team sports in this country represent a triumph of capitalism. We would be unwise to ignore

the importance of private economic decisionmaking in that success. But, the quasi-regulatory regimes that these bills would create would do just that. Moreover, they would provide a dangerous precedent for further, even more harmful, federal regulation of professional sports.

* * *

In sum, the Department of Justice believes that the new regulation and antitrust exemptions regarding franchise relocation, revenue pooling, and other professional sports league practices proposed by S. 298, S. 259, S. 172, and S. 287 are unwarranted departures from our economy's fundamental reliance on the operation of free markets, as the means of maximizing economic efficiency and consumer welfare. As presently drawn, none of these bills would well serve consumer interests. At the same time, the Department recognizes that judicial second-guessing of a league's decision to block franchise relocation does not serve the interests underlying the antitrust laws. As a practical matter, the courts are incapable of evaluating the consumer welfare effects of a franchise relocation decision. In addition, we believe that the interests of leagues in applying franchise relocation rules will nearly always coincide with the interests of consumer welfare. Because, in the unique competitive context of professional sports leagues, we cannot say that a narrowly-written and non-regulatory antitrust exemption for franchise relocation rules by itself would have a significantly adverse effect on our nation's competition policy, the Department would not oppose such an exemption. While the Department recommends against enactment of these bills in their present form, we would, of course, be happy to work with the Congress to develop legislation that avoids creating burdensome new regulatory schemes.

That concludes my prepared remarks, and I would be pleased to answer any questions the Committee might have.

APPENDIX J

APPENDIX J

STATUTES INVOLVED

SHERMAN ACT

15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

CLAYTON ACT

15 U.S.C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.